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15 I.A.³ 6

73-146

STATE OF ILLINOIS

PEOPLE VS. ROBERT BRAUN



ABST.

APPELLATE COURT THIRD DISTRICT
OTTAWA

At a term of the Appellate Court, begun and held at Ottawa,
on the 1st Day of January in the Year of our Lord one thousand
nine hundred and seventy-three, within and for the Third District
of Illinois:

Present—

+ HONORABLE JAY J. ALLOY, Presiding Justice

HONORABLE ALBERT SCOTT, Justice

HONORABLE WALTER DIXON, Justice

JOHN E. HALL, Clerk

JAMES A. CALLAHAN, Sheriff

BE IT REMEMBERED, that afterwards on
OCTOBER 26, 1973 the Opinion of the
Court was filed in the Clerk's Office of said Court, in the words
and figures following, viz:

In The
APPELLATE COURT OF ILLINOIS
Third District
A. D. 1973.

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Warren County.
)	_____
vs.)	
	)	Honorable
ROBERT BRAUN,	)	Scott I. Klukos
	)	Judge Presiding.
Defendant-Appellant.)	

Mr. PRESIDING JUSTICE ALLOY delivered the opinion of the court: **Abstract**

Defendant Robert Braun, on November 28, 1972, was sentenced to probation for a term of three (3) years with the first year to be served at the Illinois State Farm at Vandalia. Defendant had pleaded guilty to a two count indictment charging violation of the Cannabis Control Act and the Controlled Substances Act.

On appeal to this court, defendant specifically requests that this court summarily modify his sentence to three (3) years probation without the condition of incarceration and that the conviction be otherwise affirmed.

We previously gave specific consideration to this precise issue in People v. Rhinehart, 11 Ill. App. 3d 859, 296 N.E.2d 781, and in People v. Adkisson, 299 N.E.2d 145. We noted that at the time of sentencing of defendant, prior to appeal, it was permissible to imprison a defendant as part of the condition of the sentence of probation as proposed by the court, but that under the new Unified Code of Corrections which became effective on January 1, 1973, a

court may not require, as a condition of probation, that defendant be committed to a period of imprisonment unless the imprisonment is "periodic". (Ill. Rev. Stat., 1971, ch. 38 §1005-6-3(d)). In the Rhinehart case we stated expressly that we discerned in the provision with respect to the elimination of imprisonment as a condition of probation, a substantial and mitigating basic public policy and that the courts of this State have sought to adapt sentences in which a final adjudication has not been made to the general public policy expressed in amended or later statutes which may be applicable where the ends of justice will be best subserved thereby. Since there has been no final adjudication in this case for the reason that it is pending on appeal, we believe that probation is the best method of punishment of defendant and that an application of the spirit of change and modification as expressed in the Unified Code of Corrections should govern disposition of this cause.

We, therefore, conclude that the sentence should be modified to eliminate the provision that the first year of probation shall be served on the Illinois State Farm at Vandalia. The sentence shall be maintained solely as a sentence of probation for a period of three (3) years and is accordingly modified to so provide.

The judgment of conviction and the sentence as modified are affirmed and it is directed that the mittimus in this cause be modified to incorporate such change of sentence to probation alone.

Affirmed as Modified.

Dixon and Scott, JJ. concur.

15 I.A.³ 7

(24540—4M—9-70) 160-0



STATE OF ILLINOIS

APPELLATE COURT

ABST.

AT AN APPELLATE COURT, for the Fourth Judicial District of the
State of Illinois, sitting at Springfield:

PRESENT

HONORABLE JAMES C. CRAVEN, _____ Presiding Judge

HONORABLE SAMUEL O. SMITH, _____ Judge

HONORABLE LELAND SIMKINS, _____ Judge

Attest: ROBERT L. CONN, Clerk.

BE IT REMEMBERED, that to-wit: On the 24th day
of October A. D. 1973, there was filed in the office of
the Clerk of the Court an opinion of said Court, in words and figures
following:

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT

General No. 11503

Agenda 73-50

First National Bank, Mattoon, Illinois, }
Trustee of the Estate of Jessie V. }
Craig, Deceased, and David Daily, }

Plaintiffs-Appellees,

vs.

The Standard Paving Company, a
Corporation,

Defendant-Appellant. }

Appeal from
Circuit Court
Coles County

Mr. PRESIDING JUSTICE CRAVEN delivered the opinion of the court:

Plaintiffs, First National Bank, Mattoon, Illinois, trustee of the estate of Jessie V. Craig, deceased, and David Daily, a tenant, brought suit against The Standard Paving Company for damages that were incurred as the result of defendant's alleged negligence in the construction of portions of I-57 and a drainage ditch adjacent to the plaintiffs' property. After a bench trial, judgment was entered in favor of plaintiffs for \$10,999 for crop losses for the years 1965 through 1968 and \$2100 to defray the cost of re-establishing proper drainage in plaintiffs' field. The defendant appeals.

On appeal, defendant contends that the trial court improperly ruled on certain evidentiary matters; that plaintiffs did not prove their case by a preponderance of the evidence; and that the trial court erroneously entered judgment against them since defendant was required to act as it did according to specifications given it by the State. Also, defendant submits that the court erred in fixing the amount of damages.

The pertinent facts are as follows. In May 1959, the First National Bank as trustee sold certain lands belonging to the estate of Jessie V. Craig to the State of Illinois for the purpose of constructing a portion of I-57 thereon. The property in question is bound on the south by Route 16 and on the north by the Penn Central railroad tracks. I-57 was to run from south to north bounding the property on the east. The defendant commenced work on I-57 in the spring of 1965 under a contract with the State of Illinois requiring it to construct that segment of I-57 which would run between the railroad overpass and the Route 16 overpass.

Along with its primary construction duties under its contract, defendant was required to dig a drainage ditch that would be located between I-57 and the Craig property. It was to serve as a receptacle for surface moisture running off the surrounding fields and I-57 as well as moisture flowing from the plaintiffs' field tiles. While digging an exploratory trench, defendant's workmen cut an eight-inch tile and found a four-inch tile both coming from the Craig property. The four-inch tile was found

to be clogged with soil and other residue. Defendant then installed a temporary roadside drainage ditch in the spring of 1965. The permanent ditch was installed in the spring of 1966. Defendant completed its portion of I-57 in the fall of 1966. Thereafter, the highway was dedicated, opened and maintenance was left to the State.

Mr. Daily first became aware of the drainage problem in October of 1965. Daily reported to the bank that there was a considerable amount of water standing in the field and that it was stagnant, thus indicating very little flow. Initially, it was found that the ditch was in poor condition. Defendant failed to remove the excessive amounts of dirt and debris from the bottom of the ditch. Moreover, defendant did not construct headwalls in the drainage ditch as required.

By fall of 1966, after the permanent ditch was installed, there was no marked improvement. In fact, at that time the flow line of the field tiles was at the same level with the drainage ditch flow line. This was contrary to the usual practice of establishing the tile flow line approximately a foot above the bottom of the ditch. This is done in order to prevent any backup water from flowing into the field tile from the ditch itself. When water backed up into the field tile, a deposit of silt and other residue was left which accumulated and eventually clogged the tile. Once the field tiles became clogged, they would not function. As a direct consequence, the field became

saturated, a marshy condition resulted, and the productivity of the field was decreased. Plaintiffs brought suit to recover for their losses caused by defendant's negligence.

With regard to the first three issues, we have reviewed the record and find no reversible error of law. An opinion on these matters would have no precedential value. It cannot be said that the judgment is against the manifest weight of the evidence.

As to the damage phase of this case, we adhere to the rule that "where the right of recovery exists, the defendant cannot escape liability because the damages are difficult of exact ascertainment." (Johnston v. City of Galva, 316 Ill. 596, 113, 147 N.E. 453.) Absolute certitude as to the amount of damages is not required as long as damages have been proven within reasonable certainty. (Tri-County Grain Terminal Co. v. Swift & Co., 118 Ill.App.2d 313, 322, 254 N.E.2d 311.) However, if it is obvious that the amount awarded was excessive because of a mathematical error, then a remittitur must be entered to reduce the judgment accordingly.

Defendant's negligence was established and the amount of damages to plaintiff's property were proven with reasonable certainty, but due to an error in computation, we find it necessary to reduce the amount awarded for crop loss by \$572.48.

The computations were based upon figures found in plaintiffs' Exhibit No. 9. The exhibit, a multi-column chart,

establishes plaintiffs' loss by comparing the yield of plaintiffs' 52-acre field with the yield of three other fields of like size situated near plaintiffs' field. Column 1 shows actual yield of plaintiffs' field for the years 1963-1968. Column 2 reports the average yield per acre of the plaintiffs' field. Column 7 contains an average of the yield of the three nearby fields for the years 1963-1968. In 1963 and 1964, plaintiffs' field yielded approximately 10.5 bushels per acre more than the nearby fields. After defendant's acts of negligence in 1965 through 1966, the productivity of plaintiffs' field dropped significantly. Therefore, Column 8 contains an "estimated" total yield per acre for plaintiffs' field for the years 1965 through 1968, and represents the yield that plaintiffs' field would have had had it not been for defendant's negligence. This average was arrived at by adding 10.5 bushel per acre to the average yield of the nearby fields for 1965 and 1966, and adding 11.5 bushel per acre to the average of the nearby fields for the years 1967 and 1968. To determine the loss per acre for the years 1965 through 1968, the total actual average yield per acre of plaintiffs' 52-acre field for the same years (Column 2) was subtracted from the figures found in Column 8. The difference was then reported in Column 9 by year. Those figures were then multiplied by 52 to establish the total crop loss for the 52-acre field, which was reported in Column 10. Column 10 was multiplied by the local market price as set for the years 1965 through 1968 (Column 11),

in order to establish the yearly loss which is reported in Column 12. Column 12 is totaled out in order to establish the total monetary loss sustained by plaintiffs. In the computation involving Columns 9 through 12, we find some errors. We find the total of Column 12 to be \$10,426.52 rather than \$10,999.00 that was awarded plaintiffs in damages.

Judgment against defendant upon the issue of liability is affirmed. This cause is remanded with directions to enter judgment for the sum of \$10,426.52 for crop loss and \$2100 for repair costs.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED WITH DIRECTIONS.

SMITH, SIMKINS, JJ., concur.

57881

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
Plaintiff-Appellee,	)	Circuit Court of
	)	Cook County,
vs.)	
	)	Honorable
CHARLES LEWIS,	)	Robert J. Collins,
Defendant-Appellant.	)	Presiding.

PER CURIAM:



Charles Lewis (hereinafter "defendant") was found guilty at a jury trial of the offense of armed robbery, in violation of section 18-2 of the Criminal Code, and was sentenced to a term of six years to ten years to run concurrently with terms imposed upon several other convictions. (Ill.Rev.Stat. 1971, ch. 38, par. 18-2.) On appeal, he contends that the trial court erroneously admitted prejudicial matters into evidence against him and that his sentence is excessive.

Clarence Claiborne testified for the State that at about 11:00 A.M. on October 1, 1971, he was robbed at gunpoint by the defendant while the witness was servicing his route as a laundry delivery truck driver on the south side of Chicago. The witness initially observed the defendant and the defendant's gun; he was made to lie face-down on the floor of the truck while the defendant took \$22 from his pockets; and the defendant asked the witness the whereabouts of the rest of the money, after which he went through papers on the dashboard of the truck. The witness identified the defendant from a police lineup on October 15, 1971.

Also brought out from the complaining witness by the State on direct examination was the fact that he had encountered the defendant six days before the instant armed robbery, on September 25, 1971. The witness testified that he was robbed at gunpoint by the defendant on that occasion while the witness was servicing his laundry route about two blocks from where the October 1st robbery occurred. The witness, at that earlier

robbery, observed the defendant, he was made to face a wall, and \$228 was taken from him. Reference to two armed robberies by the prosecutor during opening argument to the jury was stricken upon objection by the defense, objections to the testimony of the complaining witness on direct examination concerning the September 25th robbery were denied and the testimony was allowed to stand.

The defendant, on cross-examination of the complaining witness, further pursued the details of the September 25th robbery in light of the witness' ability to observe his assailant, asking questions concerning the robbery, the weapon used, what was said during the confrontation, and the like. Defendant also referred to that robbery on the re-cross-examination of the witness.

Michael Smith testified for the State that he was with the defendant in the October 15th lineup, and that, after the lineup was concluded, the defendant stated to him that "I'm going to catch all my armed robbery fingers . . . armed robbery beefs" and that he "hit one of them twice." Objections by the defense to this testimony were denied.

The defendant testified in his own behalf that he did not rob the complaining witness on October 1, 1971, and that he was ill in bed at his sister's home that entire day, which was corroborated at trial by defendant's sister.

Defendant's initial contention that it was error to have allowed into evidence the matters relating to the September 25, 1971, robbery will not be considered on this appeal. Defendant's continued pursuance of the circumstances of that robbery upon cross-examination of the complaining witness, whether or not such tactics were calculated to inquire into the opportunity of that witness to observe the assailant on that occasion, waived his right to raise that matter on appeal. People v. Calvin, 116 Ill.App.2d 471, 481, 253 N.E.2d 922. See also, People v. Filas, 369 Ill. 51, 15 N.E.2d 496.

The cases cited by defendant in support of his position that the September 25th robbery had no relationship to the October 1st robbery with which he was charged, such as to have permitted its admission into evidence for any purpose other than the simple fact of a prior meeting, are inapplicable to the circumstances here since they do not involve trials where the unrelated crimes were inquired into by the defendants, as was the situation here. See e.g., People v. Fuerback, 66 Ill.App.2d 452, 214 N.E.2d 330; People v. Gleason, 36 Ill.App.2d 15, 183 N.E.2d 523; People v. Spencer, 7 Ill.App.3d 1017, 288 N.E.2d 612; People v. Blakely, 8 Ill.App.3d 78, 289 N.E.2d 273.

Defendant next contends that it was error to have allowed into evidence the testimony of Michael Smith relative to what the defendant told him after the lineup on the grounds that it was vague, irrelevant, and prejudicial.

Complaining witness Claiborne testified that he identified the defendant in the October 15th lineup; he also testified that he confronted the defendant on September 25 and October 1, 1971. Smith's testimony finds support in the record and "tends to prove the offense charged", making the proposition at issue more probable. People v. Allen, 17 Ill.2d 55, 63, 160 N.E.2d 818. The trial court did not abuse its discretion in allowing that testimony into evidence.

Defendant next contends that the sentence imposed upon him of six years to ten years is excessive in light of the fact that the provisions of sections 18-2 and 117-1 of the Criminal Code of 1971 violate the provisions of Article I, Section 11 of the 1970 Illinois Constitution dealing with the seriousness of a given offense and the reintegration of an offender into society. He argues that the five year minimum term imposed by section 18-2 and the prohibition of probation in section 117-1 frustrate the spirit of that constitutional provision.

The legislature has the power to fix a punishment for the commission of an offense, within constitutional limits. People ex rel. Kubala v. Kinney, 25 Ill.2d 491, 492-493, 185 N.E.2d 337. The setting of a minimum term for an offense such as armed robbery, involving, as it does, the use of a dangerous weapon, is reasonable and clearly within the spirit of the constitutional provision relating to penalties; the same is true for the statute which denies probation upon conviction of such an offense. Defendant has failed to demonstrate in what manner those sections of the Criminal Code of 1971 were unconstitutional.

The final point raised by defendant is that his sentence is excessive in light of the new Unified Code of Corrections, in that the Code presently classifies armed robbery as a Class 1 felony (not punishable by death) with a minimum term of four years and a maximum term of any number of years in excess thereof, whereas he was sentenced to a term of six years to ten years. See Ill.Rev.Stat. 1972 Supp., ch. 38, par. 18-2, 1005-8-1. Section 1005-8-2 of the Code provides a greater penalty where a firearm is used in the commission of an offense, as was the situation here. Further, the hearing in aggravation and mitigation brought out that defendant had prior convictions, and the instant sentence was in fact made to run concurrently with the terms imposed upon other offenses to which defendant had apparently pleaded guilty. The sentence imposed upon defendant is not excessive in light of the new Code.

For these reasons, the judgment of the circuit court of Cook County is affirmed.

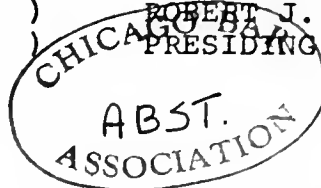
JUDGMENT AFFIRMED.

SECOND DIVISION, FIRST DISTRICT
LEIGHTON, J., did not participate.

58150

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Plaintiff-Appellee,	)	APPEAL FROM THE
	)	CIRCUIT COURT
vs.	)	OF COOK COUNTY.
)	
ALLEN HARVEY,	)	HONORABLE
	)	ROBERT J. COLLINS,
Defendant-Appellant.	)	PRESIDING.

PER CURIAM:*



Defendant, Allen Harvey, was indicted (Indictment 72-18) for the armed robbery of Walter Fells and George Butts, Jr., which occurred on November 8, 1971. After a bench trial, defendant was found guilty and sentenced to the Illinois State Penitentiary for a term of not less than five years nor more than five years and one day, said sentence to run concurrently with the sentence imposed in Indictment 72-17 [Attempted robbery of Pauline Flax].

The issues on appeal are (1) whether the trial court erred in permitting the introduction of evidence pertaining to another offense, which was not connected with the prosecution of the crime charged, and (2) whether the sentence was excessive.

The evidence shows that on November 8, 1971, Walter Fells and George Butts, Jr., were delivering whiskey to Smitty's Lounge, 611 South St. Louis Avenue, Chicago at about 2:45 in the afternoon. (St. Louis Avenue is 3500 West in Chicago.) Fells testified that after the whiskey had been delivered, Smitty gave him \$433 in cash in payment for the whiskey. Fells and Butts left the tavern by the front door. Butts was in front pushing a two-wheel cart used to carry the whiskey. Fells further testified that, as he came out of the door, defendant was on one side of the door and defendant's companion was on the other side; that someone said "Get in the alley", and, when Fells turned around, defendant had a gun in his hand and said to Fells "Give me that

money. I know you have it because I saw him give it to you." Defendant's companion took approximately \$3 in change from Butts. Thereafter defendant and his companion fled down the alley. Fells' testimony was substantially corroborated by Butts.

Fells testified that on November 19, 1971, he was again in the tavern when he saw defendant enter the door; that Fells started toward defendant and defendant ran out and down the alley. Fells ran after him; after Fells saw where defendant was going, Fells got in his truck and subsequently called the police. Butts testified that he also was in the area on November 19, 1971, and saw defendant go in the tavern; and that, after speaking to Fells, Butts drove in one direction and Fells in another, both looking for defendant; but that, when Butts got to Homan Avenue (3400 West in Chicago), defendant was not in sight.

Fells further testified that on November 19, 1971, he saw defendant in the 3200 block on West Harrison Street, Chicago, which is about three blocks east from 611 South St. Louis Avenue; that he saw defendant attempt to rob a lady [Pauline Flax, Indictment 72-17]; and that he and his helper subdued defendant and turned him over to Police Officer Arens.

The trial court, over the objection of defendant, permitted Fells to testify as to the fact of the attempted robbery of Pauline Flax on November 19, 1971, which occurred just prior to the time defendant was subdued by Fells.

Defendant testified that he was not in the tavern at the time of the alleged robbery of Fells and Butts, but was working with his brother, Charles Walker, at the Little State Theatre, 4814 West Madison Street, Chicago. Charles Walker testified substantially the same.

Defendant argues that it was reversible error for the trial court to permit the introduction of testimony involving an unrelated crime in which defendant was allegedly engaged at the

time he was overpowered and arrested on November 19, 1971, for the instant offense, committed eleven days before the said arrest.

We need not decide whether the admission of the said testimony was error, because, even if it was, it was not reversible error. This was a bench trial. It is well established that, when the trial court is the trier of fact, a presumption will be indulged that the judge considered only admissible evidence, and disregarded inadmissible evidence, in reaching his conclusion of guilt. People v. Quinn, 2 Ill.App.3d 341, 276 N.E.2d 379; People v. Robinson, 30 Ill.2d 437, 197 N.E.2d 45; People v. De Groot, 108 Ill.App.2d 1, 247 N.E.2d 177. This presumption is overcome only when the record affirmatively indicates that the inadmissible evidence was considered by the court in reaching its decision. People v. Quinn, 2 Ill.App.3d 341, 276 N.E.2d 379.

In the case at bar, the trial court permitted Fells to testify that, when on November 19, 1971, he subdued defendant and had him arrested for the robbery of November 8, 1971, defendant was then attempting to rob a lady. The action of the trial court was on the representation of the State that the evidence "goes to the circumstances of the arrest and how the man was apprehended." The record shows that the trial court sustained all subsequent objections by counsel for defendant pertaining to the attempted robbery of the lady.

In summarizing the evidence, the trial court did not refer to the attempted robbery of the lady, but stated:

"Butts, who was also in that area, drove in one direction and Fells in another, both looking, supposedly, for this defendant.

"Fells came upon the defendant, and Fells at that time had another man working with him, not Butts. Fells and the other man took the defendant into custody and turned him over to the police officers.

"The defendant and his brother have testified that he was not there at the time of the robbery, but was working in a theatre.

"As has been said by the lawyers, I have observed the witnesses in this case, and this offense occurred in broad daylight and Walter Fells and George Butts had an excellent opportunity to view the perpetrators of this offense; and their testimony was credible and clear and convincing."

There is nothing in the record which "affirmatively indicates that the inadmissible evidence was considered by the court in reaching its decision". People v. Quinn, 2 Ill.App.3d 341, 346, 276 N.E.2d 379.

Moreover, there is positive evidence that it was defendant who robbed Fells and Butts in front of Smitty's Lounge, 611 S. St. Louis Avenue, Chicago, on November 8, 1971. It is true that defendant and his brother, Charles Walker, testified that they were at the Little State Theatre, 4814 W. Madison Street, Chicago, during the time of the robbery. Although alibi evidence may not be disregarded, there is no obligation on the trial court to believe the alibi testimony where there is positive testimony to the contrary. People v. Jackson, 54 Ill.2d 143, 295 N.E. 2d 462; People v. Robinson, 3 Ill.App.3d 843, 850, 279 N.E.2d 526; People v. Bracey, 129 Ill.App.2d 57, 62, 262 N.E.2d 748. In a bench trial it is for the trial court to determine the credibility of the witnesses and the weight to be given their testimony, and, unless the evidence is so unsatisfactory as to raise a reasonable doubt of the defendant's guilt, the findings of the trial court will not be disturbed. People v. Bracey, 129 Ill.App.2d 57, 62, 262 N.E.2d 748; People v. Catlett, 48 Ill.2d 56, 64, 268 N.E.2d 378. The trial court believed the testimony of Fells and Butts over the testimony of defendant and his brother.

Hence, in the case at bar it was not reversible error for the trial court to permit the introduction of evidence that defendant was attempting to rob a lady when he was arrested on November 19, 1971, for the robbery committed on November 8, 1971, because the record shows that the trial court considered only the



admissible evidence, and disregarded the assumed inadmissible evidence, in reaching its conclusion.

Defendant also argues that the sentence imposed by the trial court was greater than the minimum sentence of four years for armed robbery provided for under the Uniform Code of Corrections (Ill.Rev.Stat. 1972 Supp., ch. 38, par. 1005-8-1), which provides in part as follows:

"(2) for a Class 1 felony, the minimum term shall be 4 years unless the court, having regard to the nature and circumstances of the offense and the history and character of the defendant, sets a higher minimum term;"

Armed robbery is a Class 1 felony (Ill.Rev.Stat. 1972 Supp., ch. 38, par. 18-2).

In People v. Harvey, 53 Ill.2d 585, 294 N.E.2d 269, it was held that the sentencing provisions of the Uniform Code of Corrections apply to cases pending on direct appeal at the effective date of the new Code. Therefore, the provisions of the Uniform Code of Corrections apply to the case at bar. The statute sets out a minimum sentence in the case of armed robbery (a Class 1 felony) of not less than four years. However, the trial court is granted discretion to set a higher minimum term by considering "the nature and circumstances of the offense and the history and character of the defendant".

In the case at bar, at the suggestion of counsel for defendant, the trial court sentenced defendant to a five year minimum sentence. On the hearing in aggravation and mitigation, it was disclosed that defendant had a previous record. Also, at the hearing in aggravation and mitigation, counsel for defendant stated that defendant "was a narcotics addict at the time of the crime and he was supporting a gigantic habit of \$100 a day". The trial court had an opportunity in the course of the trial and the hearing in aggravation and mitigation to make a sound determination concerning the punishment to be imposed. People v. Taylor,

33 Ill.2d 417, 424, 211 N.E.2d 673, 677; People v. Adams, 113 Ill.App.2d 205, 220, 252 N.E.2d 35, 43. In view of the record, the trial court in sentencing defendant to a minimum of five years and a maximum of five years and one day was acting within the discretion conferred by the statute. People v. Rudolph, 12 Ill.App. 3d 420, 299 N.E.2d 129.

The cases cited by defendant are not applicable to the facts in the case at bar.

There is no reversible error in the record and, therefore, the judgment of the trial court is affirmed.

JUDGMENT AFFIRMED.

* FIRST DISTRICT, SECOND DIVISION.
STAMOS, P.J., did not participate.

10-16-71

6 spin

2nd Div.

72-308

15 I.A.³ 34

UNITED STATES OF AMERICA

: ABST.

State of Illinois)
Appellate Court) ss.
Second District)

At a session of the Appellate Court, begun and held at Elgin, on the 4th day of December, in the year of our Lord one thousand nine hundred and seventy-two, within and for the Second District of Illinois:

Present -- Honorable WILLIAM L. GUILD, Presiding Justice

Honorable THOMAS J. MORAN, Justice

Honorable GLENN K. SEIDENFELD, Justice

LOREN J. STROTZ, Clerk Pro Tem

JOSEPH C. DORING, Sheriff

BE IT REMEMBERED, that afterwards, to wit: On

October 29, 1973 the Opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, viz:

10-16-1
min

NO. 72-308

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Plaintiff-Appellee,	)	Appeal from the Circuit
	)	Court of Ogle County,
-vs-)	
)	
JUAN LUGO a/k/a JOHN LUGO,	)	Hon. William B. Phillips,
	)	Judge presiding.
Defendant-Appellant.)	

PRESIDING JUSTICE WILLIAM L. GUILD delivered the opinion of the court:

The defendant, Juan Lugo a/k/a John Lugo, was found guilty in a jury trial of the offense of aggravated battery under Ill. Rev. Stat.¹⁹⁶⁹/ch. 38, sec. 12-4 (b) (6). He was placed on probation for two years, the first sixty days to be served in the Ogle County Public Safety Building on a work release program.

The issues are (1) whether or not the defendant was proven guilty beyond a reasonable doubt; (2) whether or not the information in this case was sufficient to adequately inform the defendant of the charge brought against him; (3) whether or not the defendant can be charged with aggravated battery when he struck a peace officer who was in the process of making an invalid arrest; (4) whether or not the trial court erred in allowing the complaining witness to remain in the court room while excluding all other witnesses.

On December 5th, 1971 at approximately 12:35 A. M., the defendant was arrested by two police officers at his residence in Rochelle, Illinois. Sometime earlier that evening, defendant

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10 min

and one Ramon Torres had had a fight. After the fight, Torres went to the Rochelle police department and filed a written complaint against the defendant. Two police officers, accompanied by Torres, went to the defendant's residence for the purpose of arresting the defendant. They did not have a warrant.

We shall first consider the contention of defendant that he was not proven guilty beyond a reasonable doubt. Defendant's witness, Jose Gonzales, testified that the two officers went into the bedroom, beat the defendant as he was lying in bed, and hit him over the head with a pistol. Defendant did not recall where the altercation took place. Both officers and Ramon Torres testified defendant came to the doorway of the apartment, was told he was under arrest and the hitting of the officer occurred in the hallway. This is a question of fact for the jury and they apparently believed the testimony of the state's witnesses was more plausible than that of defendant's witness. We find no reason to substitute our judgment for that of the jury.

People v. Sauber (1966), 68 Ill. App. 2d 133 at 143, 214 N.E.2d 918 .

The defendant Lugo was charged with aggravated battery for his attack upon police officer Haggstad. Under Ill. Rev. Stat.¹⁹⁶⁹/ch. 38, sec. 12-4 (b) (6), a person commits an offense of aggravated battery when

"A person who in committing a battery * * *
[k]nows the individual harmed to be a peace officer * * * while such officer is engaged in the execution of any of his official duties including arrest or attempted arrest."

10-16-1

rain

The information charging the defendant with aggravated battery generally followed the language of the statute with relation to aggravated battery upon a peace officer. The information specifically alleged that the defendant committed the offense of aggravated battery in that the defendant "did intentionally and knowingly and without legal justification cause bodily harm to Keith Haggstad, knowing him to be a peace officer engaged in the execution of his official duties, by making physical contact of an insulting or provoking nature with the said Keith Haggstad."

Defendant contends that the information should specifically state that (1) the police officer was injured or (2) that the defendant made bodily contact of a provoking or insulting nature. It is apparent that the defendant relates this contention to the definition of battery in Ill. Rev. Stat. 1971, ch. 38, par. 12-3, upon which a charge of aggravated battery is based. Par. 12-3 provides that "a person commits battery if he intentionally or knowingly without legal justification and by any means, (1) causes bodily harm to an individual or (2) makes physical contact of an insulting or provoking nature with an individual." (Emphasis added.)

The information does in fact set forth plainly in the language of the statute the nature of the offense committed by the defendant. It contains the allegation of both bodily harm and physical contact of an insulting or

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provoking nature. This court does not believe that the allegations are inconsistent. The information fully advised the defendant of the nature of the offense allegedly committed by him, to-wit: that he caused bodily harm to the police officer and by making bodily contact of an insulting or provoking nature. We cannot see how defendant was prejudiced in any way by the terminology of this information. At best, the addition of the phrase "by making physical contact of an insulting or provoking nature" is surplusage. It is also^{to}/be noted that at the time of trial the defendant made no objection to the allegations contained in the information. People v. Jordan (1969), 115 Ill. App.2d 307, 252 N.E.2d 701.

Defendant contends that the arrest here without a warrant was invalid unless the officer had reasonable grounds to believe that an offense had been committed and by the party charged. We find, however, the arrest was valid. Under 1969, Ill. Rev. Stat./ch. 38, sec. 107-2 (c), a police officer may arrest a person without a warrant if he has reasonable grounds to believe the defendant had committed an offense. When Mr. and Mrs. Torres came to the police station to file a complaint against the defendant Lugo, the arresting officer, Keith Haggstad, observed that "Ramon [Torres] was bleeding from the lip and Rose [Torres] was quite dirty as though she had been rolling around on the ground." After Mr. Torres signed a complaint, Torres led Officer Haggstad and another officer to the defendant's residence. At the residence Torres identified the defendant before the arrest was attempted.

10-16-71

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In People v. Stapelton (1972), 4 Ill. App. 3d 477, 281 N.E.2d 76, the court ruled that a police officer had made a valid arrest under similar circumstances. The arresting officer there had investigated the crime, and the complaining witness, as in the case before us, accompanied the officer and identified the suspect before the arrest.

The defendant's final contention is that the trial court erred in allowing the arresting officer to remain in the court room at the State's Attorney's request after the trial court granted the defendant's motion to exclude all witnesses. The trial court did not err. In People v. Dixon (1961), 23 Ill.2d 136, 177 N.E.2d 206, cited by defendant, the Supreme Court discussed this question in detail pointing out the majority and minority rule, and held that the action of the trial judge in arbitrarily refusing to exclude all the witnesses was an abuse of discretion. However, we find the Supreme Court stated the following shortly thereafter in People v. Mack (1962), 25 Ill. 2d 416, 422, 185 N.E.2d 154, 157:

"* * *(T)he defendant has no absolute right to have witnesses excluded * * *, and that the power to exclude witnesses is within the sound discretion of the trial court. * * * It is a common practice for a trial court, in granting a motion to exclude witnesses, to except, at the request of the State's Attorney, one witness for the People, frequently, but not always, one of the arresting officers. This practice has been upheld by this court on numerous occasions."

See also People v. Townsend (1957), 11 Ill. 2d 30, 47, 141 N.E.2d 729, where the witnesses were excluded but the police officer permitted to remain in the court room. We find the trial court did not abuse its discretion by allowing the arresting officer to remain in the court room.

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For the foregoing reasons, the judgment of the trial court is affirmed.

AFFIRMED.

SEIDENFELD and MORAN, J. J. Concur.

10-16-71

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72-344

15 I.A.³ 36

UNITED STATES OF AMERICA

State of Illinois)
Appellate Court) ss. ABST.
Second District)

At a session of the Appellate Court, begun and held at Elgin, on the 4th day of December, in the year of our Lord one thousand nine hundred and seventy-two, within and for the Second District of Illinois:

Present -- Honorable WILLIAM L. GUILD, Presiding Justice
Honorable THOMAS J. MORAN, Justice
Honorable GLENN K. SEIDENFELD, Justice
LOREN J. STROTZ, Clerk Pro Tem
JOSEPH C. DORING, Sheriff

BE IT REMEMBERED, that afterwards, to wit: On October 29, 1973, the Opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, viz:

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NO. 72-344

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Plaintiff-Appellee,	)	Appeal from Kane County.
)	
-vs-	)	Hon. John S. Petersen,
	)	Judge presiding.
GREGORY SHELTON,)	
)	
Defendant-Appellant.)	

PRESIDING JUSTICE WILLIAM L. GUILD delivered the opinion of the court:

The defendant was convicted of attempt armed robbery and armed robbery and on November 2, 1970 was sentenced to a term of not less than 7 years nor more than 25 years in the State penitentiary. Defendant's petition for post-conviction relief was denied on August 7, 1972 without an evidentiary hearing. This is an appeal from that post-conviction petition, the sole basis being that the sentence imposed is excessive.

While not raised as a direct issue, the defendant contends that the disparity of his sentence considered with the sentence imposed upon the co-defendants constitutes a violation of his constitutional rights. For that reason we feel it necessary to examine the facts of the instant offense.

The defendant, 18 years of age, was released from the St. Charles School for Boys on or about June 8, 1970. Five days later he was arrested for the instant offense. Defendant together with one Elzie Jones, Hosea Lee Vine, and Willie Kimmons, entered a residence in Aurora where a party was in progress. All four defendants were armed with pistols and they proceeded to attempt to rob the guests. In the process thereof Willie Kimmons shot and killed one of the guests. Defendant in pointing out the disparity of sentence states that Elzie Jones

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was only sentenced to serve a term of not less than 5 nor more than 7 years; that co-defendant Vine was sentenced to a term of not less than 2 nor more than 7 years. Defendant, however, fails to mention the fact that Willie Kimmons was sentenced for murder for a term of 50-75 years. The courts of Illinois have stated in several instances that the Illinois Constitution does not require that all participants in a criminal act must receive the same punishment. Likewise, disparity of sentences between defendants does not warrant the use of the power of the review court to reduce the punishment imposed by the trial court. (People v. Gibbs (1972), 7 Ill. App. 3d 517, 288 N.E. 2d 70, and cases cited therein. People v. Brooks (1972), 51 Ill.2d 156, 281 N.E.2d 326.) In Brooks one of the defendants contended that his sentence should/ have been reduced because he did not in fact shoot the victim and requested reduction of his sentence under the authority conferred on courts of review by Rule 615 (b) (4) of the Supreme (Ill. Rev. Stat. 1971, ch. 110A, par. 615(b)(4).) Court./ The court stated therein that the fact that the one defendant did not in fact shoot the deceased did not lessen his accountability for the crime in which he participated.

In the armed robbery case before us one of the defendants did shoot and kill one of the guests in the house. In Brooks the Supreme court stated at page 168:

"* * *that the authority to reduce sentences should be applied with considerable caution, for the trial judge ordinarily has a superior opportunity in the course of the trial and the hearing in aggravation and mitigation to make a sound determination concerning the punishment to be imposed than do the appellate tribunals."

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See also People v. Jackson (1970), 47 Ill. 2d 344, 348.

We turn then to the basic issue presented to us and that is, does the alleged excessiveness of defendant's sentence raise a constitutional issue? As we stated in Gibbs, supra, we "find that this defendant's constitutional rights to due process and equal protection have not been violated as the sentence imposed upon him is well within the statutory limits and there is no indication that the trial court abused its discretion in imposing a greater sentence upon this defendant." 7 Ill. App. 3d at p. 519.

Likewise, in People v. Ballinger (1973), 53 Ill. 2d 388, 390, the Supreme court similarly stated:

"The sentence is within the statutory limits and although subject to review on direct appeal, the allegation of excessiveness raises no issue cognizable under the Post-Conviction Hearing Act."

Attention is also directed to People v. Murry (1972), 5 Ill. App. 3d 64, 283 N.E.2d 98, where the court again held that the severity of sentence is not a constitutional question under the Post-Conviction Act.

The court did not err in dismissing the petition for post-conviction relief and the judgment of the trial court is affirmed.

AFFIRMED.

SEIDENFELD and MORAN, J.J. Concur.

10-16-1

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15 I.A.³ 37

UNITED STATES OF AMERICA

State of Illinois)
Appellate Court) ss.
Second District)

At a session of the Appellate Court, begun and held at Elgin, on the 4th day of December, in the year of our Lord one thousand nine hundred and seventy-two, within and for the Second District of Illinois:

Present -- Honorable WILLIAM L. GUILD, Presiding Justice

Honorable THOMAS J. MORAN, Justice

Honorable GLENN K. SEIDENFELD, Justice

LOREN J. STROTZ, Clerk Pro Tem

JOSEPH C. DORING, Sheriff

BE IT REMEMBERED, that afterwards, to wit: On October 29, 1973, the Opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, viz:

10-16-1

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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

Abstract

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Plaintiff-Appellee,	)	Appeal from the Circuit
	)	Court for the 18th Judi-
v.	)	cial Circuit, DuPage
	)	County, Illinois.
PHILLIP E. JAROS,)	
)	
Defendant-Appellant.)	

MR. JUSTICE SEIDENFELD delivered the opinion of the court:

The defendant, Phillip E. Jaros, pleaded guilty to the crime of burglary in accordance with plea negotiations. The defendant was sentenced to 1-3 years in the penitentiary. A second count charging the included offense of theft over \$150 was nolle prossed; and several pending charges of deceptive practices, as to which defendant acknowledged his guilt, were dismissed as a part of the plea bargain.

The Illinois Defender Project, appointed as counsel for defendant on appeal, has petitioned for leave to withdraw after filing a brief as required by Anders v. California (1967), 386 U.S. 738, and People v. Jones (1967), 38 Ill.2d 384. Defendant has received notice of Petition to Withdraw and has filed pro se documents contending that appointed counsel at trial encouraged him to plead guilty, thereby depriving him of the right to raise a substantial constitutional question of search and seizure; and that his counsel's representation was "limited". We have also considered

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defendant's transmittal letter in which he requests our opinion on whether Ill.Rev.Stat. 1967, ch.37, art. 2, sec. 2-2 violates the equal protection clause of the State and Federal Constitutions by giving girls the protection of the juvenile court until their 18th birthday and denying the same to boys after their 17th birthday. (We find no basis in the record for any application of this issue to this defendant. We, however, refer defendant to People v. McGalvin, Illinois Supreme Court, Doc. No. 44839, May 1973, which upholds the classification.)

We have reviewed the entire record, together with the petition, memoranda of counsel and the pro se documents.

The record discloses a complete admonishment by the court before accepting the plea and an understanding waiver of defendant's rights.

Prior to his plea, a Motion to Suppress Evidence on the ground that the car in which defendant was riding as a passenger was stopped on the mere suspicion that the youthful driver may have been a runaway, was denied. However, it appeared that after stopping the automobile, the officer recognized the defendant and recalled that there was an outstanding arrest warrant for him. The officer then placed the defendant under arrest, searched him for weapons and further noticed a white cloth bag on the floor of the car where the defendant had been seated, which defendant acknowledged to be his. The bag contained items taken in the burglary. While the court found that the stopping of the car on suspicion was improper, he denied the Motion to Suppress on the basis of the arrest warrant and the search, and concluded that the search was incident thereto or was otherwise justified under the "plain view" doctrine.

Alleged error in ruling on the Motion to Suppress cannot be considered on appeal since it was of a nonjurisdictional nature

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and thus waived by the entry of a voluntary plea of guilty. People v. Phelps (1972), 51 Ill.2d 35, 38; People v. Brown (1969), 41 Ill.2d 503, 505.

We further conclude that there is no basis for defendant's claim that the alleged erroneous ruling on the Motion to Suppress may have motivated or coerced the entry of the guilty plea. The court stated in the presence of defendant and appointed counsel that it was a close case. A change of plea was entered into at a later date after negotiations, and represented a voluntary and intelligent choice of the alternatives available to defendant. People v. Phelps (1972), 51 Ill.2d 35, 38. See also Tollett v. Henderson (1973), 36 L Ed 2d 235, 243.

The Motion to Withdraw is allowed and the judgment of the trial court is affirmed.

Motion to Withdraw Allowed; Judgment Affirmed.

GUILD, P.J. and THOMAS J. MORAN, J. concur.

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15 I.A.³ 37

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UNITED STATES OF AMERICA

State of Illinois)
Appellate Court) ss.
Second District)

At a session of the Appellate Court, begun and held
at Elgin, on the 4th day of December, in the year of our
Lord one thousand nine hundred and seventy-two, within and
for the Second District of Illinois:

Present -- Honorable THOMAS J. MORAN, Acting Presiding Justice

Honorable GLENN K. SEIDENFELD, Justice

Honorable JAMES CRAVEN, Justice

LOREN J. STROTZ , Clerk Pro Tem

JOSEPH C. DORING, Sheriff

BE IT REMEMBERED, that afterwards, to wit: On

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the Opinion of the Court was filed in
the Clerk's office of said Cour-, in the words and figures
following, viz:

10-16-7

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Abstract

FILED

OCT 17 1973

LOREN J. STOLTZ, Clerk pro tem
Appellate Court, 2nd District

Appeal from the Circuit
Court of the Eighteenth
Judicial Circuit, DuPage
County, Illinois.

The plaintiffs, A. N. Walker, Jr., and Patricia Walker, entered into an installment sales contract to sell a residence to the defendant, LaGrange State Bank as Trustee under Trust No. 391. Defendant Evelyn Ward signed an attached exoneration clause relieving the bank from personal liability under the contract. On November 9, 1971, a fire occurred in the residence. Plaintiffs subsequently filed a forcible entry and detainer action on March 14, 1972, based on defendants' failure to keep the premises in good repair after the fire. The case was heard in the Circuit Court of DuPage County before Associate Judge George H. Bunge. After a hearing in which the court found for the plaintiffs, he granted several stays to enable the purchasers to cure the default. On October 31, 1972, the court found that

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defendants had not cured the default, denied a rehearing and ordered Writs of Restitution and Assistance to issue to restore plaintiffs to possession.

On November 1, 1972, defendants filed a notice of appeal from the various orders, including the judgment order of October 31, 1972. No appeal bond was filed and plaintiffs were restored to possession on November 8, 1972.

A second notice of appeal was filed on December 7, 1972. The record does not disclose further prosecution by defendants of this or the previously attempted appeal from the forcible entry and detainer judgment. Defendant Evelyn Ward appeared both pro se and through various attorneys throughout the proceedings below.

On December 7, 1972, Evelyn Ward filed a petition before Judge Locke requesting vacation of the prior orders entered by Associate Judge Bunge. Over plaintiffs' motion to strike which alleged that the court lacked jurisdiction, Judge Locke assumed jurisdiction, gave defendants 10 days to file an answer to plaintiffs' motion to strike the petition, and granted defendants leave to file a complaint against the plaintiffs and the National Ben Franklin Insurance Company of Illinois, the fire insurance carrier on the subject residence at the time of the fire.

On January 18, 1973, defendants filed a reply to plaintiffs' motion to strike, and on January 29, 1973, defendants filed cross-complaints against plaintiffs and the National Ben Franklin Insurance Company.

Without further order of the trial court, plaintiffs filed, on February 5, 1973, a petition for leave to appeal under the authority of Supreme Court Rule 306 (Ill. Rev. Stat. 1971, ch. 110A, par. 306). We allowed the motion on the basis of the

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allegation that Judge Locke's order, dated January 9, 1973, was an order granting a new trial. However, it appears from the record now before us that, by its terms, Judge Locke's order does not grant a new trial. It is an order permitting defendants to answer plaintiffs' motion to strike defendants' petition, which sought to vacate and set aside Judge Bunge's orders, and, further, permitting defendants to file a complaint against plaintiffs and the insurance carrier. We have thus concluded that leave to appeal was improvidently granted and that our previous order should be vacated and the appeal dismissed.

Defendants' petition, filed more than 30 days after the final judgment granting possession was entered, must be considered as a section 72 petition. (Schuman v. Department of Revenue (1967), 38 Ill. 2d 571, 573) The petition is based on the alleged failure of the court to take into account certain facts, some of which are events occurring after the initial hearing before Judge Bunge, namely, the acceptance of payments by the plaintiffs after notice of default, and the receipt by the plaintiffs of the fire insurance proceeds which allegedly should have been credited to the purchase price of the house.

Appeals from orders granting section 72 relief are specifically provided (Ill. Rev. Stat. 1971, ch. 110, par. 72(6)), so that resort to Supreme Court Rule 306 is inappropriate to review a section 72 petition. Moreover, a petition under section 72 commences a new action (Fennema v. Vander Aa (1969), 42 Ill. 2d 309, 310), is not a continuation of the original proceeding (In re Estate of Peterson (1972), 3 Ill. App. 3d 636, 637), and may not be used to relitigate factual matters previously heard (Frandsen v. Anderson (1969), 108 Ill. App. 2d 194, 202). By the very nature of a section 72 proceeding, it is not a "new trial" designed to give the litigant a second chance to relitigate the same factual issues previously heard

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by the trial court. Yet Supreme Court Rule 306 is designed to prevent a party from losing his verdict justified by the record and undergoing the hazards, delay, and expense of another trial. Wettaw v. Retail Hdw. Mut. Fire Ins. Co. (1936), 285 Ill. App. 394, 396.

. Finally, even if it were assumed that defendants' section 72 petition serves as a request for a new trial under Rule 306 and that Rule 306 should apply to section 72 proceedings, the order appealed from does not grant such a "new trial", making the petition for leave to appeal premature in any event. The court below did not decide the merits of plaintiffs' motion to strike, the central issue of which plaintiffs are now urging on appeal, i.e., the propriety of post-judgment proceedings or relief in a forcible entry and detainer action¹. Rather, the court gave defendants 10 days to answer plaintiffs' motion to strike.

Since the petition for leave to appeal was improvidently granted, we vacate our order granting leave to appeal from the order of January 9, 1973, deny the petition, and dismiss this appeal. Plaintiffs' arguments presented on appeal should be decided first by the trial court judge who, as of this time, has not vacated the forcible entry and detainer judgment but merely entertained the motion to vacate. We cannot presume that he will proceed except as provided under section 72.

Appeal dismissed.

CRAVEN, J. and THOMAS J. MORAN, J. concur.

1 On this matter see Janusz v. Kaleta (Abs. 1965), 57 Ill. App. 2d 127; Weinberg v. Warren (1950), 340 Ill. App. 365, 370-371; Kjellberg v. Muno (1950), 340 Ill. App. 133, 136-139; Goldblatt v. Perlman (Abs. 1949), 338 Ill. App. 654; Atlas Finishing Co. v. Anderson (1948), 336 Ill. App. 167, 175-178 (dissent).

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IN THE
APPELLATE COURT OF ILLINOIS
FIFTH DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,)	
	)	Appeal from the Circuit Court of
Plaintiff-Appellee,	)	Madison County.
)	
vs.)	
)	
CHARLES LEROY FREEMAN III,	)	Honorable William L. Beatty,
	)	Honorable Harold R. Clark,
Defendant-Appellant.	)	Judges Presiding.

PER CURIAM:

The defendant was indicted for the crime of felony theft. Pursuant to a plea agreement, he pled guilty and was sentenced to one to four years in the penitentiary.

A notice of appeal was filed, and the office of the Illinois Defender Project was appointed to represent the defendant. That office has petitioned this Court for leave to withdraw as counsel and has filed a brief in support of the petition pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 stating in effect that the appeal is frivolous and without merit. After receiving the motion and brief from the Illinois Defender Project, this Court served notice of the pending petition upon the defendant and granted him leave to file documents supporting his appeal. The defendant has failed to respond.

The Illinois Defender Project brief alleges that there are only four issues which could possibly be raised on appeal. All of them are without substantial merit.

The first question is whether the trial court complied with Supreme Court Rule 402(c) by determining that a factual basis for the defendant's guilty plea existed. A factual basis can be found in the following excerpt from the record:

The Court: If you waive a trial by jury and plead guilty to the charge, you are admitting that you took this car. Do you understand what we are talking about?

The Defendant: Yes.

The defendant could argue that his affirmative answer meant only that he understood what the court was talking about and that it was not an admission that he took the car. The



defendant's answer is more reasonably interpreted to mean that by pleading guilty he was admitting that he took the car. Under this interpretation, the defendant's affirmative response was sufficient to establish a factual basis for his guilty plea. In People v. Hudson, 7 Ill.App.3d 800, 288 N.E.2d 533, we said, "All that is required to appear on the record is a basis upon which the judge could reasonably reach the conclusion that there is a connection between the defendant's acts and the intent to which he acted and the acts and intent required to constitute the offense to which the defendant is pleading guilty." The defendant's admission that he took the car satisfied this test.

The second potential issue on appeal is whether the trial court complied with Supreme Court Rule 402(a)(4) which requires the court to admonish the defendant that by pleading guilty he waives the right to a jury trial. In admonishing the defendant, the court asked:

The Court: If this sentence would be adjudged, you would withdraw the jury and enter a plea of guilty here this morning, is that correct?

The Defendant: Yes, sir.

Because the defendant had never asked for a jury, the words "withdraw the jury" may have misled him.

A statement made by the court just prior to the above statement, however, indicates that the defendant did realize that he was waiving a jury trial.

The Court: If you waive a trial by jury and plead guilty to the charge, you are admitting that you took this car. Do you understand what we are talking about?

The Defendant: Yes, sir.

That statement indicates that pleading guilty and waiving a jury trial go hand in hand. Rule 402(a)(4) was substantially complied with.

The defendant could also contend that the trial court erred by saying, "In a plea of this kind, since it has been recommended, there would be no probation hearing nor would we go into your background." After the court asked whether there was anything else to be said, the defendant's counsel stated that the defendant had no prior felony record and that he had a family of three adopted children. It also appears that the defendant had ample opportunity to introduce other evidence in mitigation if he wished to.

The remark that there would be no probation hearing was not error. The court did not tell the defendant that he had no right to apply for probation. The court merely told the defendant that if he accepted the plea agreement and the negotiated sentence, there would be no probation hearing.

Finally, the defendant may maintain that the trial court did not comply with Supreme Court Rule 402(d)(2). That provision requires the trial court, if it has indicated concurrence or conditional concurrence in the plea agreement, to so state in open court at the time the agreement is stated. The trial court did indicate its conditional concurrence in the plea agreement by stating that it would concur in the State's recommendation if it "seemed reasonable." The defendant may claim, however, that this concurrence was illusory because the court had already stated there would be no hearing to go into the defendant's background. It may be argued that under these circumstances the trial court had no means available to determine that the plea agreement was "reasonable." That argument is without merit, however, because defense counsel did in fact introduce evidence in mitigation. The court could have considered this in determining that the recommended sentence was reasonable.

Petition allowed; Judgment affirmed.

Publish Abstract Only.

No. 73-135

IN THE
APPELLATE COURT OF ILLINOIS
FIFTH DISTRICT

PEOPLE OF THE STATE OF ILLINOIS
Plaintiff-Appellee,

vs.

LEE MUELLER,

Defendant-Appellant.

) Appeal from the Circuit
Court of St. Clair County,
Illinois.

) Honorable Robert Gagen,
Judge Presiding.

MR. JUSTICE JONES delivered the opinion of the court:

Defendant entered a negotiated plea of guilty to the crime of burglary and was sentenced to a term of imprisonment of not less than four nor more than ten years. He appeals with the contention that the trial court improperly considered arrests and other encounters with the police that did not result in convictions and abused its discretion in denying probation and imposing the sentence.

The defendant appeared before the court on February 1, 1973, accompanied by his attorney, and entered a negotiated plea of guilty. The plea agreement was that the defendant would enter a plea of guilty in exchange for no recommendations by the State as far as sentence or disposition were concerned. The defendant personally confirmed the agreement. At this hearing the defendant made an oral motion for probation. The case was continued and the matter referred to the probation department for investigation and report. The hearing was resumed on February 26, 1973. The defendant testified in his own behalf and produced a statement from a prospective employer to the effect that he would be given work as a roofer if probation was granted. Defendant's prior record of arrests and convictions was presented to the court through his F.B.I. "rap sheet" and his arrest record from the local law enforcement agencies.

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They were a part of the report of the probation officer which was received and considered by the court. This report recommended that probation be denied. At the hearing defendant was examined by his attorney concerning his several previous encounters with the law.

Defendant's arrest record shows he had been arrested 20 times prior to the burglary charge in question. He was sentenced to the State Penal Farm at Vandalia for a one year term for contributing to the sexual delinquency of a minor. There were also eight additional convictions of misdemeanors, all upon a plea of guilty. They were for disorderly conduct (theft of \$91), reckless driving, threat to do bodily harm (upon a charge made by his father), disorderly conduct (by contributing to the delinquency of a minor), disorderly conduct (by drinking), four counts of contributing to the delinquency of a minor, driving while license revoked and running a red light. Fines were levied as the penalty in each of these cases except that for the conviction of driving while license revoked a sentence of seven days in jail was also imposed. In three of the cases defendant was jailed on a mittimus for failure to pay the fine. In addition to the convictions shown the arrest record recited that defendant admitted the theft of a battery and gas valued at \$27 and that upon making restitution he was lectured and released. The remainder of the arrests shown were without disposition.

At the conclusion of the hearing upon defendant's application for probation the application was denied and the sentence imposed. The defendant now contends that the trial court improperly considered his arrest record in imposing the sentence and states that this is shown by the court's remark: "The court feels in this case that punishment is warranted because of your past and the fact that you do have a prior record." We disagree with defendant's contention. While there are arrests shown on defendant's record for which there was no prosecution

or disposition the record is replete with convictions that sufficiently justify the sentence imposed by the court.

It is well established that a court may consider information on a "rap sheet" or probation report, even if they contain hearsay, in a hearing on a petition for probation or a hearing in aggravation and mitigation. (People v. Forman, 102 Ill.App.2d 482, 247 N.E.2d 917; People v. McWilliams, 2 Ill.App.3d 776, 277 N.E.2d 726.) And in imposing a sentence for conviction of a felony the court is not required to ignore defendant's past record of convictions for misdemeanors. (People v. Insolata, 112 Ill.App.2d 269, 251 N.E.2d 73.) It is true enough that arrests or other encounters with the law which have not resulted in convictions are inadmissible at the hearing in aggravation and mitigation in arriving at the punishment for the crime charged. (People v. Price, 7 Ill.App.3d 110, 286 N.E.2d 530; People v. Jackson, 95 Ill.App.2d 193, 238 N.E.2d 196.) However, defendant's arrest record contained nine convictions which were properly considered, and it will be presumed that the trial court, at the hearing in aggravation and mitigation, disregarded any incompetent or immaterial evidence. (People v. Johnson, ___ Ill.App.3d ___, 300 N.E.2d 535; People v. Robinson, 116 Ill.App.2d 325, 253 N.E.2d 570; People v. Price.) It is further to be noted and considered that not only did defendant not refute any of the convictions shown on his arrest record, he admitted and explained them. People v. Runnerfield, 4 Ill.2d 29, 122 N.E.2d 170.

In view of defendant's record we believe the court was justified in imposing the sentence in question. However, we are compelled to note that the sentence was imposed subsequent to the date the Uniform Code of Corrections (Ill.Rev.Stat. 1972, ch. 38, sec. 1001-1-1 et seq.) became effective, January 1, 1973. Burglary is a Class 2 felony and under the Code the permissible sentence is not less than one nor more than twenty years, the minimum to be one year unless the court, having regard to the

matter and circumstances of the offense and the history and character of defendant, sets a higher minimum term, which shall not be greater than one-third of the maximum. (Uniform Code of Corrections, sec. 1005-8-1(c)(3).) The court must make the requisite findings to impose a minimum sentence in excess of one year, and this was done. Here, the negotiated plea was not for a particular term of sentence so we need not decide whether defendant has waived the statutory spread between the minimum and maximum. It follows that the minimum term properly exceeds one year but improperly exceeds one-third of the maximum term. Accordingly, pursuant to People v. Chupich, ___Ill.2d___, 295 N.E.2d 1 and People v. Scaglione, ___Ill.App.3d___, 294 N.E.2d 107 the minimum sentence is reduced to three years and four months and the cause is remanded for the issuance of a corrected mittimus.

Judgement affirmed sentence reduced, and remanded with directions.

Publish in abstract only.

CONCUR: /s/ Edward C. Eberspacher

CONCUR: /s/ George J. Moran

72-208

UNITED STATES OF AMERICA

State of Illinois)
Appellate Court) ss.
Second District)

At a session of the Appellate Court, begun and held at Elgin, on the 4th day of December, in the year of our Lord one thousand nine hundred and seventy-two, within and for the Second District of Illinois:

Present -- Honorable WILLIAM L. GUILD, Presiding Justice
Honorable THOMAS J. MORAN, Justice
Honorable GLENN K. SEIDENFELD, Justice
LOREN J. STROTZ, Clerk Pro Tem
JOSEPH C. DORING, Sheriff

BE IT REMEMBERED, that afterwards, to wit: On November 5, 1973 the Opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, viz:



15-2
FILED

NOV 5 - 1970

No. 72-208

LOREN J. STROTZ, Clerk pro tem
Appellate Court, 2nd District

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

Abstract

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Plaintiff-Appellee,	)	Appeal from the Circuit
	)	Court of the 17th Judi-
v.	)	cial Circuit, Winnebago
	)	County, Illinois.
CHESTER LEE HOLLIMAN,)	
)	
Defendant-Appellant.)	

MR. JUSTICE SEIDENFELD delivered the opinion of the court:

Defendant was found guilty in a jury trial under Count II of an indictment charging that he unlawfully possessed or had under his control Heroin, in violation of the Uniform Narcotic Drug Act (Ill.Rev.Stat. 1969, ch.38,par.22-3). The jury found defendant not guilty under Count I of the indictment which charged an unlawful sale of Heroin. Judgment of conviction and sentence of 3-6 years in the penitentiary was entered under the provisions of the Controlled Substances Act (Ill.Rev.Stat. 1971, ch.56½,par.1402(b), on proof of less than 1 gram of the substance.

Defendant contends on appeal that his sentence was excessive, that he was entrapped as a matter of law, that the court erred in denying his motion to dismiss the indictment, and also committed prejudicial error in ruling on evidence and instruction.

Defendant is shown by the record to be a reformed drug addict who became addicted to heroin in 1967 after ten years of steady employment and a normal life following graduation from high school in 1957. In 1970 he became a participant at a methadone treatment

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12/72

center where he became acquainted with Lynn Peek, a police informant. The informant did not testify.

An undercover police officer testified that on August 9, 1971, he was introduced to the defendant by Miss Peek and posed as her former boy friend from California. He sought defendant's help in obtaining heroin. Defendant said that he would see what he could do about it, and the three of them entered a bar in Rockford. The defendant came and went throughout the evening, saying on each return that nobody had anything to sell. The next day, the informant and the undercover officer went to an apartment in Rockford where defendant answered the door and invited them in. The officer asked defendant if they could purchase heroin there. Defendant said that he would see and went upstairs. A short time later he returned and told the police officer that they would not sell because they thought he was a policeman.

On August 12, 1971, the police officer and the informant again saw the defendant. Defendant approached them and said "Let's go cop some jive", offering to take the officer to "Sheila's house" for the purchase. When the officer said he wanted to buy it personally, the defendant said he would see what she said. When they arrived at Sheila's, the informant and the defendant went into the house and returned five minutes later. Defendant told the officer that Sheila would not sell to him that day but would later if he returned by himself. Defendant said he had arranged to buy \$40 worth, for which defendant provided \$15 and the officer \$25.

Defendant remained in the house for five minutes and returned to the car. The three people then drove to the pool hall. Inside the building, defendant gave two aluminum foil packets and a needle to the informant, who handed them to the officer. After looking at them, the officer put them in his pocket and the three played pool. The arrest was made at a later time.

Testifying in his own behalf, defendant admitted having conversation with the officer and admitted being at the scene of the purported sale. However, he denied taking part in the sale of heroin, and his testimony indicated that any heroin obtained by the officer came from the informant. Defendant testified that the parties went to Sheila's house, but that he had remained inside several hours while the informant went into the kitchen and talked to Sheila. Defendant then claimed to have left.

The defendant's claim of entrapment is based on the theory that the police officer who testified against him incited or induced the offense. However, defendant's denial of involvement in the offense precludes him from urging the defense of entrapment. (People v. Outten (1958), 13 Ill.2d 21, 24-25; People v. Fleming (1971), 50 Ill.2d 141, 144.) Sherman v. United States (1958), 2 L ed 2d 848 cited by the defendant is factually inapposite and does not support defendant's contention that entrapment was established as a matter of law.

We next consider defendant's contention that Count II of the indictment is void because it charges more than one offense in the same count contrary to the provisions of Ill.Rev.Stat. 1969, ch.38, par.11-4(a). Count II is based on the statute, Ill.Rev.Stat. 1969, ch.38, par.22-3:

"Violation. Sec. 3. It is unlawful for any person to manufacture, possess, have under his control, sell, prescribe, administer, dispense or compound any narcotic drug, except as authorized in this Act. No person may unlawfully use narcotic drugs."

Defendant concludes that "possession" and "having under his control" are two separate offenses and thus improperly charged in the same count. We do not agree. In People v. Rosenfeld (1962), 25 Ill.2d 473, 475, the court held that an indictment which charged in the disjunctive that the defendants had "possessed or had under their control" marijuana, was valid since the two words were intimately

associated in their meaning. In the context of the statute as relevant here, the ultimate fact is the unlawful possession of a narcotic drug, and "control" is relevant to the extent that it tends to prove constructive possession. (People v. Pugh (1967), 36 Ill.2d 435, 437; People v. Robinson (1969), 102 Ill.App.2d 171, 175.) A single offense may be charged in more than one way without constituting duplicity. People v. Ross (1961), 21 Ill.2d 419, 420-421.

Defendant's corollary argument that the giving of instruction as to both "control" and "possession" was prejudicial error is not supported by citation of any authority. Defendant, in fact, submitted the instruction defining "control", while the State submitted the instruction defining "possession". No prejudice has been shown resulting from the giving of both instructions and we find no merit in defendant's argument.

Defendant also argues that he was denied the opportunity to show bias on the part of the police officer who is the only prosecution witness to the alleged offense. The record, however, discloses that defense counsel was allowed wide latitude in the cross-examination of the officer as to his possible bias. An objection was sustained to the particular question complained of, "from your experience in police work you have strong personal feelings about drug users?". However, there was no offer of proof or any further discussion of the ruling. It is undisputed that the widest latitude should be allowed a defendant in cross-examination for the purpose of showing bias; but the record must show that limiting a particular cross-examination was prejudicial to the defendant in order to constitute reversible error. (People v. Naujokas (1962), 25 Ill.2d 32, 37-38.) We find no abuse of the court's discretion or prejudice to the defendant on this record. See People v. McCain (1963), 29 Ill.2d 132, 134; People v. Caldwell (1965), 62 Ill.App.2d 279, 284; People v. Haney (1968), 95 Ill.App.2d 1, 9.

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C-12/73

The remaining claims of trial error do not require extended discussion.

The court did not err in giving an instruction on circumstantial evidence since some of the proof could be characterized as circumstantial. (People v. Sullivan (1972), 7 Ill.App.3d 417, 422.) The court further did not err in refusing an instruction that defendant had entered a plea of not guilty since the jury was fully informed as to the presumption of innocence and the fact that the indictment did not create any inference of guilt.

Defendant was not prejudiced by the failure of the State to call the informer as a witness. Defendant was first denied the name of the informer but the information was subsequently furnished to him prior to trial and he was given a continuance to obtain impeaching information. Defendant did not attempt to call the informer as a witness at the trial although she was available. There is no requirement that the State call the informer to testify. People v. Aldridge (1960), 19 Ill.2d 176, 180; People v. Dollen (1971), 2 Ill.App.3d 567, 571-572.

Defendant also contends that he was prejudiced by the denial of his motion for a directed verdict on Count I charging the sale. However, since defendant offered evidence at trial contrary to the issue he thereby waived his rights and is precluded from appeal on the court's ruling. People v. Washington (1962), 23 Ill.2d 546, 548; People ex rel. Kubala v. Woods (1972), 52 Ill.2d 48, 54.

We then reach the claim of defendant that his sentence was excessive. The defendant was sentenced under the provisions of the Controlled Substances Act (Ill.Rev.Stat. 1971, ch.56 $\frac{1}{2}$, par. 1402(b)). We have compared the penalties under this act with those under the Uniform Code of Corrections (Ill.Rev.Stat. 1972, Supp., ch.38, par.1001-1-1, et seq.) and have concluded that the penalties under the Uniform Code of Corrections are greater than under the

Oct. 12/73

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previous act and therefore do not apply. However, the State has conceded that the appropriate minimum penalty would be two years. Considering the circumstances of the offense and of the offender, we exercise our power to reduce sentences under Supreme Court Rule 615 (Ill.Rev.Stat. 1971, ch.110A,par.615). We accordingly reduce the minimum sentence to two years and as so modified the judgment below is affirmed.

Judgment affirmed as modified.

GUILD, P.J. and THOMAS J. MORAN, J. concur.

15 I.A.³ 285

72-190

UNITED STATES OF AMERICA

State of Illinois)
Appellate Court) ss.
Second District)

At a session of the Appellate Court, begun and held at Elgin, on the 4th day of December, in the year of our Lord one thousand nine hundred and seventy-two, within and for the Second District of Illinois:

Present -- Honorable WILLIAM L. GUILD, Presiding Justice

Honorable THOMAS J. MORAN, Justice

Honorable GLENN K. SEIDENFELD, Justice

LOREN J. STROTZ, Clerk Pro Tem

JOSEPH C. DORING, Sheriff

BE IT REMEMBERED, that afterwards, to wit: On November 19, 1973 the Opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, viz:

1252

Abstract

NO. 72-190

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

FILED

NOV 19 1973

LOREN J. STROTZ, Clerk pro tem
Appellate Court, 2nd District

THOMAS L. BREHM, JUDITH L. BREHM,
and SHERYL, RENEE' and NICOLE BREHM,
minors, by THOMAS L. BREHM and JUDITH L.
BREHM, their parents and next friends,

Plaintiffs-Appellants,

v.

JOHN DOBSON and YEGEN ASSOCIATES
MIDWEST INC., a corporation,

Defendants-Appellees.

Appeal from the Circuit
Court of the Nineteenth
Judicial Circuit, Lake
County, Illinois.

MR. JUSTICE THOMAS J. MORAN delivered the opinion of the court:

Plaintiffs appeal from a summary judgment in favor of defendant Yegen Associates Midwest, Inc., (hereinafter, Yegen), a corporation.

These facts are undisputed: Defendant Dobson was employed as sales and marketing manager for one of Yegen's divisions; his position required extensive traveling; he used his own car on some trips; he was reimbursed for travel expenses but not for weekly trips made between his home and office despite disclosure that he, at times, would work at home on company business. As part of his job, Dobson was expected to entertain Yegen's customers.

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12/1/73

Dobson went to the office about 9:00 A.M. on December 24, 1969. A fellow employee had informed him that an office party was scheduled for that day to "boost the morale" of the office girls. The office closed at noon and employees were given the option of staying for the party or leaving for the day. Although not specifically invited, Dobson attended the party and stayed until a little after 5:00 P.M. when it ended. Being the last management-level person present, he stayed to help "straighten up the party room." While driving home, his car collided with that of the plaintiffs. No report of the accident was made to Yegen.

Plaintiffs brought suit against Dobson and Yegen alleging that Dobson was an employee of Yegen and within the scope of his employment at the time of the accident. Subsequent to filing an answer and taking depositions, Yegen moved for a summary judgment asserting that Dobson was not within the scope of his employment at the time of the occurrence. The trial court, after considering the pleadings, depositions and exhibits, agreed and allowed the motion.

The general rule is that accidents which occur while an employee is going to or from his place of employment do not arise out of or in the course of his employment, Burmeister v. Industrial Com., 52 Ill. 2d 84, 86 (1972). Exceptions to the rule are made when the demands of employment require the employee to travel to a different locale, Sjostrom v. Sproule, 33 Ill. 2d 40 (1965), when the employee is requested by his employer to perform a special errand on his way to or from home, Sanborn Co. v. Industrial Com., 405 Ill. 50 (1950), or when an employee's attendance of the employer's annual function is compulsory, Lybrand, Ross & Montgomery v. Industrial Com., 36 Ill. 2d 410 (1967).

157-2
C-11/72

Where but a single inference can be drawn from undisputed facts, summary disposition is proper; when reasonable persons could draw different inferences from those facts, a triable issue exists. Based upon this rule, plaintiffs argue that summary judgment for Yegen was improper in that certain inferences can be drawn from the facts herein which would show Dobson was within the scope of his employment at the time of the accident.

Plaintiffs recite that no prescribed hours nor designated location were required for Dobson's performance of his job-related duties; that he worked at the office, while traveling and, on occasion, at home on a schedule dictated only by his responsibilities and the business needs of his employer and that his car had previously been used for company business. It is suggested that under these facts it could reasonably be inferred that Dobson was driving from "the party room" to a place where he could "do more work - his house." We do not find these facts sufficient to substantiate plaintiffs' desired inference for they are, in actuality, nothing more than a general recitation of Dobson's work habits. No fact or facts are disclosed from which fair minds could infer that Dobson intended to work at home after leaving the office on this particular Christmas Eve.

We are next asked to consider that because Dobson's duties encompassed entertaining persons on behalf of his employer, this duty inured to the benefit of Yegen's "morale boosting" party. On this basis, plaintiffs claim it could be inferred that Dobson's travel to and from the office on that day amounted to a "special errand" for his employer and therefore he was excepted from the rule. Such inference is neither reasonable nor acceptable. Dobson was not expected to be present at the party, did not participate in its planning, was not required to attend and, indeed, was not specifically invited. He

15 r - 3

Ct. 1/3/73

was free (as were the other employees) to leave the office at noon on that date.

Finally, plaintiffs contend that because Yegen encouraged the use of alcoholic beverages in promoting a business interest and Dobson participated in such use, it would be "a matter of most primitive justice that he be considered to be in the scope of his employment until the inevitable effects of that ingestion...have worn off." No law has been cited to support this proposition of "primitive justice"; we find no merit to such theory under the facts before us.

A review of the record reveals no triable issue of material fact, neither does it advance any reasonable inference that Dobson may have been within the scope of his employment at the time of the accident. The judgment of the trial court is affirmed.

Judgment affirmed.

GUILD, P.J. and SEIDENFELD, J. - Concur

Dec. 14/73

15 I.A.³

15 I.A.³ 287

72-213

UNITED STATES OF AMERICA

State of Illinois)
Appellate Court) ss.
Second District)

At a session of the Appellate Court, begun and held at Elgin, on the 4th day of December, in the year of our Lord one thousand nine hundred and seventy-two, within and for the Second District of Illinois:

Present -- Honorable WILLIAM L. GUILD, Presiding Justice

Honorable THOMAS J. MORAN, Justice

Justice

Honorable GLENN K. SEIDENFELD, Justice

LOREN J. STROTZ, Clerk Pro Tem

JOSEPH C. DORING, Sheriff

BE IT REMEMBERED, that afterwards, to wit: On

November 19, 1973 the Opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, viz:

Abstract

NOV 19 1973

LOREN J. STETZ, Clerk pro tem
Appellate Court, 2nd District

Plaintiffs-Appellants,

Appeal from the Circuit
Court for the Eighteenth
Judicial Circuit, DuPage
County, Illinois.

Defendants-Appellees.

Plaintiffs appeal from a decree finding valid and binding the city ordinance zoning their property as a multiple family residential district. In light of the factors relevant to determining the reasonableness of zoning, the issue on review is whether the evidence supports the decision of the trial court.



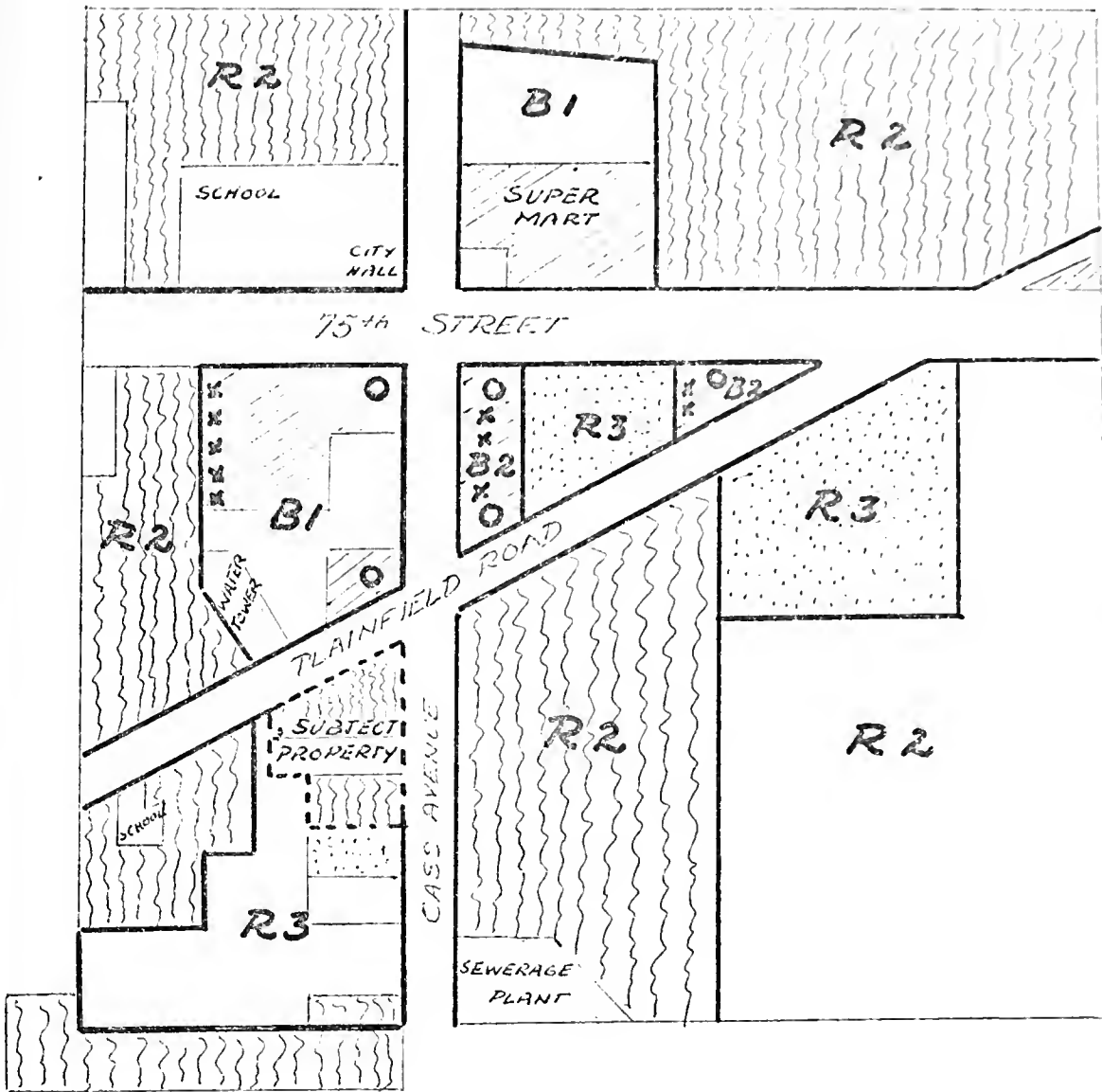
1/8/73

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One Pecora, having an option to purchase the site in question, desires to use the property for a chain grocery store, a gasoline service station and several "satellite" stores. Plaintiffs, the Dallners, are the owners of five lots (about 5-1/4 acres) located at the southwest corner of the intersection of Cass Avenue and Plainfield Road. The property was acquired by the husband and father of the various plaintiffs in 1952 when the surrounding area was farmland; it has been owned by members of the family since that time. At present, the site is developed with four single family dwellings - one rented and three occupied by members of the family.

The irregularly shaped parcel has a frontage of nearly five hundred feet on Plainfield and over seven hundred feet on Cass. At the time the complaint was filed, the site was zoned single family residential under the county ordinance, but at the time of the hearing it was zoned for multiple family use under the city ordinance. Here, we direct our attention to the zoning ordinance adopted by the defendant, the City of Darien.



ZONING

- B1 COMMERCIAL
- B2 " / GENL. RETAIL
- R2 SINGLE FAMILY
- R3 MULTI FAMILY

PRESENT USE

- COMMERCIAL
- MULTI FAMILY RESIDENTIAL
- SINGLE FAMILY RESIDENTIAL
- PUBLIC/SEMI PUBLIC
- GAS STATION
- AREA OF SMALL SHOPS

In addition to the zoning and uses which surround plaintiffs' property (see diagram), the evidence revealed that a development of over seven hundred dwelling units was proposed for an area approximately one-half mile west of plaintiffs' property, south of Plainfield Road; 15,000 square feet at the eastern end of that complex is intended to accommodate 6 to 12 businesses.

Plaintiffs contend that when consideration is given the factors necessary to determine the validity of a zoning restriction, the evidence shows that classifying their property as a multiple family residential district is unreasonable. Such factors have been frequently stated; they will not be here reiterated except as they pertain to the contentions raised. (In as much as the plaintiffs have repeated the same facts in arguing different issues, our responses to the issues will, of necessity, also be somewhat repetitive.)

Plaintiffs assert that it is necessary that there be a real or substantial relationship between the existing zoning and the public health, safety, morals and general welfare; that because the record in the present case does not disclose such evidence, the ordinance is void. Plaintiffs' argument implies that the burden is upon the defendant to prove the reasonableness of the ordinance as it relates to defendant's police powers. This is not the law. There is a presumption of validity in favor of a zoning ordinance and the one attacking it must overcome the presumption by clear and convincing evidence. (Urann v. Village of Hinsdale, 30 Ill. 2d 170, 174-175 (1964).) Continuing, plaintiffs claim the evidence established that the present zoning bore no relationship to the general welfare. In support, they point to testimony by their witnesses that the highest and best use of the property would be for the type of commercial facilities proposed, that such commercial development would, at most, have a minimal adverse

effect on surrounding properties, and that any adverse effect would be offset by the benefit the community would derive from additional commercial uses. Contrary testimony by one of defendant's witnesses, a real estate appraiser, attested that the highest and best use of the property is as presently zoned, that the zoning provides a natural buffer for the commercial district to the north and offers a less detrimental effect to the surrounding residential properties than the proposed commercial zoning. There being a conflict in the evidence relating to the effect which present and proposed zoning might bear on the general welfare, we do not find the testimony of plaintiffs' witnesses sufficient of itself to overcome the presumption of validity.

Plaintiffs reason that because only four houses occupy the more-than-five-acre site in the center of a growing community, there is a strong indication that it cannot be economically developed as zoned. This contention must be rejected for we are unable to find evidence in the record that plaintiffs have at any time attempted to sell their property for a use which conforms to current zoning.

Plaintiffs next contend that the property is presently worth \$140,000 but would be valued at \$350,000 under the proposed use, that since the ordinance was not shown to have a reasonable basis in the public welfare requiring the restriction and the resulting loss, the present restrictive zoning is invalid. Diminution of value caused by zoning restrictions is a proper consideration in determining the reasonableness of a zoning ordinance but such factor is not decisive. (Urann, supra, 30 Ill. 2d 170, 176.) Contrary to plaintiffs' position that there was no showing of public welfare, evidence did establish that current zoning permitted Plainfield Road to act as a natural buffer and barred the intrusion of commercial uses into a residential area. We must also consider

as significant, testimony which indicated that defendant had spent considerable time and money in formulating planned zoning ordinances and land uses within the city. (Sinclair Pipe Line v. Richton Park, 19 Ill. 2d 370, 378 (1960); Locker v. City of McHenry, 89 Ill. App. 2d 457, 460 (1967).) The public has an interest in maintaining conformity to zoning classifications, (Skrysak v. Village of Mt. Prospect, 13 Ill. 2d 329, 334 (1958),) and here, absent evidence of any substantial deviation from the city's plan, it is clear that defendant has safeguarded that public interest. We conclude that the interest of the public embodied in the city's plans outweighs the economic hardship which the present zoning may impose upon the plaintiffs.

It is asserted that the site draws its character from the business uses to the north and northeast. It is, however, of paramount importance to determine whether subject property is zoned in conformity with surrounding existing uses and whether those uses are uniform and established. (Chi. Title & Trust Co. v. City of Harvey, 30 Ill. 2d 237, 239 (1964).) Defendant's evidence supports a finding that the commercial core of the city is centered on 75th Street, Plainfield Road acting as a divider between residential and business uses. The fixing of boundary lines, unless arbitrary or capricious, is a legislative determination, (Bolger v. Village of Mount Prospect, 10 Ill. 2d 596, 603 (1957). See also, Urann, supra, 30 Ill. 2d 170, 176.) The sole deviation south of Plainfield brought to our attention is the proposed commercial use, i.e., the convenience center planned as a part of the development complex some one-half mile to the west of the site. We agree with the trial court that because of the distance between this business use and the site in question, the residential character of plaintiffs' property will not be affected. We find that the character of plaintiffs' property is drawn from the surrounding residential uses rather than from the commercial uses to the north.



Again based upon their witnesses testimony that the highest and best use of the site would be commercial development, plaintiffs claim that the property is not suited to the use presently zoned. We repeat, defendant's witnesses maintained that present zoning affords the highest and best use and that multiple family use provides an ideal buffer between the commercial uses to the north of Plainfield Road and the single family residential uses to its south. It is established that where there is a conflict in testimony, the findings of the trial court will be affirmed unless against the manifest weight of the evidence, (Nat. Bank v. County of Winnebago, 19 Ill. 2d 487, 495 (1960); Bauske v. City of Des Plaines, 13 Ill. 2d 169, 181 (1957).) The evidence adequately supports a finding in favor of defendant on the issue of suitability.

Contending that an additional consideration is whether there is community need for the use proposed by the property owner, (Locker, supra, 89 Ill. App. 2d 457, 460,) plaintiffs argue that additional business facilities of the type proposed are needed because of the growth of the city. Evidence shows, however, that there are five other gasoline stations within a quarter mile of the site, a large chain grocery less than one thousand feet from the site and other retail stores, including small grocers, directly north. We conclude that the need for the proposed project was debatable and that the finding of the trial court was not against the manifest weight of the evidence.

Plaintiffs claim that there has been a substantial changing trend toward development of a central business core in the area which surrounds the subject property, pointing out that in 1957, commercial classifications were given the tract north of Plainfield, west of Cass and south of 75th, and the tract on the east side of Cass between Plainfield and 75th; that in 1963, the county granted a special use permit for a gasoline



Dec. 13/73

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station at the southwest corner of the intersection of Cass and 75th and, in 1968, zoned the northeast corner of that intersection for business use. This Court approved the use of the northwest corner of Cass and Plainfield for a gasoline station (Brookhaven Plaza Corp. v. County of DuPage, 72 Ill. App. 2d 224 (1966)) prior to defendant becoming a city. While these facts show a trend toward the development of business uses north of Plainfield Road, they do not affect the conclusion that the area to its south, including plaintiffs' property and parcels adjacent thereto, continues residential in nature.

Consideration of all factors argued by plaintiffs fails to show that the ordinance is unreasonable or that the decision of the trial court is against the manifest weight of the evidence. The judgment is affirmed.

Judgment affirmed.

GUILD, P.J. and SEIDENFELD, J. - Concur

Ch. 18/73

15 I.A.³

15 I.A.³ 356

73-47

PEOPLE
VS.

WILLIAM HUFF AND JANET HUFF

STATE OF ILLINOIS



APPELLATE COURT THIRD DISTRICT
OTTAWA

At a term of the Appellate Court, begun and held at Ottawa,
on the 1st Day of January in the Year of our Lord one thousand
nine hundred and seventy-three, within and for the Third District
of Illinois:

Present— PC

HONORABLE JAY J. ALLOY, Presiding Justice

HONORABLE ALBERT SCOTT, Justice

HONORABLE ALLAN L. STODER, Justice

HONORABLE WALTER DIXON, Justice

JOHN E. HALL, Clerk

JAMES A. CALLAHAN, Sheriff

BE IT REMEMBERED, that afterwards on

NOVEMBER 30, 1973 _____ the Opinion of the
Court was filed in the Clerk's Office of said Court, in the words
and figures following, viz:

Ch. 1/1/73

15 r .3

No. 73-47

In The
APPELLATE COURT OF ILLINOIS

Third District

A D. 1973.

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Warren County.
)	_____
vs.)	
	)	Honorable
WILLIAM HUFF and JANET HUFF,	)	Scott I. Klukos
	)	Judge Presiding.
Defendants-Appellants.)	

PER CURIAM	Abstract
------------	----------

In the Circuit Court of Warren County, defendant William Huff was sentenced to a term of probation for three years, conditioned upon the defendant spending the first six months of his probation at the Illinois State Farm at Vandalia, Illinois. Defendant Janet Huff was similarly sentenced to a three year probationary sentence, conditioned upon her spending the first 90 days of probation in the Warren County Jail at Monmouth, Illinois. Both defendants were convicted of the misdemeanor charge of possession of Cannabis (more than 10 but less than 30 grams) in violation of Section 4(c) of the Cannabis Control Act. (Ill. Rev. Stat., 1971, ch. 56-1/2 §704(c)).

On appeal in this Court, defendants request summary sentence modifications. They correctly point out that under the new Illinois Unified Code of Corrections (Ill. Rev. Stat., 1972 Suppl., ch. 38, §1005-6-3(d)), a court may not require as a condition of a sentence of probation that the offender be committed to a period of imprisonment except pursuant to Article 7 (which deals with periodic imprisonment). While the sentences in this case were imposed prior to the effective applicable date of the Code of Corrections, we have determined that it is proper to modify judgments entered prior to the date in order to reflect what we described as the "spirit of the change and modification as expressed in the Unified Code of

Oct. 18/73

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Corrections" (People v. Rhinehart, ____ Ill. App. 3d ____, 296 N.E. 2d 721;
People v. Adkisson, ____ Ill. App. 3d ____, 299 N.E. 2d 145, 146; and
People v. Haynes, 10 Ill. App. 3d 923, 295 N.E. 2d 354, 356).

We note from the probation officer's report in the present case that defendant Janet Huff had no prior arrests or convictions for any crimes or misdemeanors, and that William Huff has been convicted only for three traffic offenses and possession of liquor as a minor. On the record, we feel that it is appropriate that the sentences be modified in accordance with the motion for such modifications in this Court. It is also represented by private counsel retained by defendants that careful examination of the record in the cause has forced counsel to the conclusion that, if the motion for summary sentence modification is allowed, there would be no further reasonable basis upon which to proceed with the appeal. It is also alleged, and not denied, that from the time of the entry of the court order allowing probation on October 24, 1972, the defendants William Huff and Janet Huff have been successfully serving their terms of probation.

We, therefore, conclude that the sentence modifications should be allowed, and it is, accordingly, ordered that the judgments of the Circuit Court of Warren County in this cause are herewith expressly modified so that the provisions thereof in the orders for probation, providing for a period of incarceration for each defendant, are deleted and eliminated, and that the sentences remain as terms of probation for three years for each of the defendants, with probation service deemed to have commenced on October 24, 1972.

Other than as herein expressly modified, the judgments of the Circuit Court of Warren County are affirmed.

Modified and Affirmed.

151.3

15 I.A.³ 431

72-275

UNITED STATES OF AMERICA

State of Illinois)
Appellate Court) ss.
Second District)

At a session of the Appellate Court, begun and held at Elgin, on the 4th day of December, in the year of our Lord one thousand nine hundred and seventy-two, within and for the Second District of Illinois:

Present -- Honorable WILLIAM L. GUILD, Presiding Justice
Honorable THOMAS J. MORAN, Justice
Honorable GLENN K. SEIDENFELD, Justice
LOREN J. STROTZ, Clerk Pro Tem
JOSEPH C. DORING, Sheriff

BE IT REMEMBERED, that afterwards, to wit: On November 29, 1973 the Opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, viz:

Ch. 18/73

157.3

FILED

No. 72-275

NOV 29 1973

LOREN J. STUBBS, Clerk of the Court
Appellate Court, 2nd District

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

Abstract

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Plaintiff-Appellee,	)	Appeal from the Circuit
	)	Court for the 17th Judi-
v.	)	cial Circuit, Winnebago
	)	County, Illinois.
MONROE FRANKLIN, JR.,)	
)	
Defendant-Appellant.)	

MR. JUSTICE SEIDENFELD delivered the opinion of the court:

The defendant, Monroe Franklin, Jr., was convicted of Armed Robbery upon his negotiated plea of guilty, and sentenced to 5-10 years imprisonment in the penitentiary. A second count of the indictment charging Robbery was dismissed.

On appeal defendant contends that the trial court did not determine that the plea was voluntary before accepting it. He has also filed a motion for summary modification of sentence which we have taken with the case. The sole basis of defendant's claim that the court failed to determine that the plea was voluntary is that it did not specifically inquire whether any force, threats, or any promises, apart from the plea agreement, were used to obtain the plea, pursuant to Supreme Court Rule 402(b) (Ill.Rev.Stat 1971, ch.110A, par.402(b)). He makes no claim that his plea was in fact involuntary. However, the record discloses that the defendant was admonished of his rights to a jury trial, to confront witnesses against him, and to defend the charges. The factual basis for the

plea, and the terms of the plea agreement were clearly described in open court. The court also explained the nature of the charges; advised defendant of minimum and maximum sentence which could be imposed; and defendant unequivocally expressed understanding.

In our view, the record shows substantial compliance with the rule and we find no merit in the defendant's argument for reversal. 11 Ill. App. 3d 875, 877-879, People v. Gibson (1973), 297 N.E.2d 31, 33-34; People v. Krassel 12 Ill. App. 3d 64, 65-67, (1973), 298 N.E.2d 384, 385-6. See also People v. Arndt (1971), 49 Ill.2d 530, 533-4; People v. Reeves (1971), 50 Ill.2d 28, 29-30.

The Uniform Code of Corrections (Ill.Rev.Stat. 1972 Supp., ch. 38, par.1001-1-1 et seq.) is clearly applicable to defendant's sentence since the new minimum sentence is less than under prior law. Under the law in force when defendant was sentenced the minimum term for armed robbery was 5 years (Ill.Rev.Stat. 1971, ch.38, par. 18-2(b)). The Uniform Code of Corrections classifies this offense as a Class 1 felony (Ill.Rev.Stat. 1972 Supp., ch.38, par.18-2). A Class 1 felony is punishable by a minimum term of 4 years unless the court, having regard for the nature and circumstances of the offense and the history and character of the defendant, sets a higher permissible minimum term. Ill.Rev.Stat. 1972 Supp., ch. 38, par.1005-8-1(c)(2).

While the minimum sentence of 5 years imposed herein could comply with the new Code of Corrections, we cannot be certain from the record that the negotiated plea and the court's concurrence in it were not premised on the statutory minimum then in effect. We, therefore, deny the motion for summary modification of sentence, affirm the judgment of conviction, and remand the cause to the trial court for sentencing pursuant to the Uniform Code of Corrections.

Affirmed and Remanded with Directions.

GUILD, P.J. and THOMAS J. MORAN, J. concur.

Dec. 18/73

15 I.A.³ 541

56548

PEOPLE OF THE STATE OF ILLINOIS,)
)
Plaintiff-Appellant,) APPEAL FROM THE CIRCUIT
)

15 I.A.³ 454
(247-3)-97-160-6

STATE OF ILLINOIS

APPELLATE COURT

AT AN APPELLATE COURT, for the Fourth Judicial District of the
State of Illinois, sitting at Springfield:

PRESENT

HONORABLE JAMES C. CRAVEN. Presiding Judge
HONORABLE SAMUEL O. SMITH, Judge
HONORABLE LELAND SIMKINS, Judge

Attest: ROBERT L. CONN, Clerk.

BE IT REMEMBERED, that to-wit: On the 6th day
of December A. D. 1973, there was filed in the office of
the Clerk of the Court an opinion of said Court, in words and figures
following:

56548

PEOPLE OF THE STATE OF ILLINOIS,)
)
 Plaintiff-Appellant,) APPEAL FROM THE CIRCUIT
)
 vs) COURT OF COOK COUNTY

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT

General No. 12222

Agenda 73-207

THE PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellee,
vs.
JACK NORTHRUP,
Defendant-Appellant.

Appeal from
Circuit Court
Sangamon County

MR. PRESIDING JUSTICE CRAVEN delivered the opinion of the court:

On December 7, 1970, the defendant entered a plea of guilty to a charge of theft over \$150 arising out of a June 20, 1970 incident in which he allegedly obtained unauthorized control of a 1970 pickup truck. The trial court admonished the defendant as to his rights and on December 22, 1970 sentenced the defendant to a term of one year and five months to five years in the Illinois State Penitentiary. The defendant was not then advised of his right to appeal.

On April 10, 1972, the defendant pro se filed a post-conviction petition in the circuit court alleging that his plea of guilty was coerced, that his attorney was incompetent, and that

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PEOPLE OF THE STATE OF ILLINOIS,)
)
Plaintiff-Appellant,) APPEAL FROM THE CIRCUIT
)
vs) COURT OF COOK COUNTY

he was harassed by the sheriff and other jail personnel and that such harassment induced him to plead guilty. He also alleged that his sentence was excessive. The circuit court appointed counsel to represent the defendant; counsel filed an amended or supplemental petition and thereafter an evidentiary hearing was held upon the amended allegations of the post-conviction petition. The court heard the testimony of the defendant and of the defendant's attorney at the time of the original proceeding. On December 21, 1972, the court denied post-conviction relief but admonished the defendant as to his right to appeal his original conviction and sentence and permitted the defendant to file a notice of appeal which purports to be a notice of appeal of the original December 1970 conviction. The notice of appeal was filed December 22, 1972.

The original and the post-conviction proceedings and the issues raised here are necessarily intermingled and relate to the same issues in substance.

The district defender of the Illinois Defender Project appointed as counsel for the defendant on appeal has filed a brief in accordance with the requirements of Anders v. California, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493, setting forth the issues presented by the record and concluding that the guilty plea admonishments present no justiciable issue for review and any request for review would be frivolous. Counsel on appeal affirmatively assert that the trial court substantially complied with the requirements of Supreme Court Rule 402 and with the

Def. 1/8/73

15 I.A.³ 541

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PEOPLE OF THE STATE OF ILLINOIS,)
)
Plaintiff-Appellant,) APPEAL FROM THE CIRCUIT
)
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constitutional requirements that pleas of guilty be knowingly and voluntarily made.

The notice of appeal which purports to appeal the original conviction is of course not timely filed. We will consider the notice of appeal as an appeal from the denial of post-conviction relief. We find no infirmities in the original proceeding and no failure to comply with the requirements of Rule 402. We have examined the record and find no basis for post-conviction relief. Accordingly, the motion of the Illinois Defender Project to withdraw as counsel for the defendant is allowed and the judgment of the circuit court of Sangamon County is affirmed.

AFFIRMED.

SIMKINS, SMITH, JJ., concur.

De. 18/73

15 I.A.³ 541

56548

PEOPLE OF THE STATE OF ILLINOIS,)
)
Plaintiff-Appellant,) APPEAL FROM THE CIRCUIT
)
vs.) COURT OF COOK COUNTY.
)
CLARENCE JOHNSON,) HONORABLE
) KENNETH R. WENDT,
Defendant-Appellee.) PRESIDING. ABST.

PER CURIAM:

Clarence Johnson, hereinafter "defendant," was charged in a three-count indictment with the aggravated battery and attempt murder of one Robert Arciniega, in violation of sections 12-4 and 8-4 of the Criminal Code, respectively. (Ill.Rev.Stat. 1969, ch.38,pars. 8-4, 12-4.) Defendant was discharged pursuant to his petition filed under section 103-5(a) of the Criminal Code; the State prosecutes this appeal pursuant to Supreme Court Rule 604(a). (Ill.Rev.Stat. 1971, ch.38,par.103-5; ch.110A,par.604.)

Subsection (a) of section 103-5 of the Criminal Code provides in part that a person in the custody of the State for an alleged offense shall "be tried by the court having jurisdiction within 120 days from the date he was taken into custody unless delay is occasioned by the defendant***" The State contends on appeal, as it did at the hearing on the defendant's petition for discharge, that the continuance from December 29, 1970 to January 15, 1971 granted by the trial court as a "Motion State," was occasioned in part by the defendant so that he was not in fact entitled to discharge under section 103-5(a) of the Criminal Code at the time his petition for discharge was filed.

Defendant was charged by criminal complaint, filed in November, 1970, with the aggravated battery by shooting of Robert Arciniega on July 26, 1970. An apparently unrelated criminal complaint was filed against defendant on October 21, 1970 charging him with an aggravated battery committed upon one Thomas Perez on August 10, 1970. A warrant for defendant's arrest issued on August 12, 1970 and the record

reveals that defendant voluntarily surrendered himself to the police on October 21, 1970.

The State was responsible for continuances to December 29, 1970, on which date the Arciniega matter was called for hearing. The court noted that the complaining witness was not present, the defense counsel answered ready and demanded trial, the matter was passed for a brief period, and the State thereafter answered ready for trial. After a hearing the court stated, "All right. Finding of probable cause. Grand Jury.," whereupon the following colloquy ensued between the court and both counsel:

"Mr. Banks (defense counsel): We ask it be held until the 15th of January; your honor, there is another charge there, Perez. Is the Court going to S.O.L. that case?"

Mr. McClory (assistant state's attorney): Your Honor, we were unable to make contact with the Perez family today.

Mr. Banks: The defendant is answering ready and demanding trial on that complaint, too.

The Court: You want that to go over to the same date?

Mr. McClory: Yes, your Honor, I would suggest it and find out --

The Court: Motion State, January 15th.

Mr. McClory: We may agree upon it to cover both cases or whatever.

The Court: January 15th.

The Defendant: Your Honor, could I talk to you a minute?

Mr. Banks: No, no.

The Court: No, not now.

Mr. Banks: Thank you, your Honor."

The half sheets on both the Arciniega complaint and the Perez complaint reflect that those matters were continued "by agreement" to January 15, 1971, and that on that date they were sent to the grand jury. The instant indictment was returned against the defendant on February 24, 1971 and, commencing on March 3, 1971 and continuing through the date

of the filing of the petition for discharge on July 19, 1971, the defendant requested and was allowed numerous continuances.

The petition for discharge alleged, inter alia, that defendant had been released from custody on February 5, 1971 because the grand jury had returned a "no bill" in the instant matter, that the 120-day term had expired on February 18, 1971, that he was not brought to trial within that time, that he caused no delay in that regard and that the instant indictment was returned more than 120 days after his incarceration on the instant charge. At the hearing on the petition for discharge counsel for the State represented to the court that the defendant was mistakenly released from custody on February 5 because the "no bill" involved the Perez case and not the instant case; counsel also argued that the defendant, at the December 29, 1970 hearing on the instant matter, could not both demand trial and request that the trial be put over until January 15, 1971 without being charged with a continuance for that period of time. The trial court ruled that the State was responsible for the continuance and the defendant's petition for discharge was allowed.

A common sense reading of the December 29, 1970 transcript of proceedings indicates that the delay to January 15, 1971 was occasioned in part by the defendant. While defendant did in fact answer ready for and demand trial as to both the instant case and the Perez case on December 29, 1970, he did so only after it was apparent that the State did not have available to it the prosecuting witnesses in Perez and that the case might be stricken off with leave to reinstate (S.O.L.). To allow defendant to rely upon his demand for trial under these circumstances, in light of his clearly expressed request for a continuance from December 29, 1970 to January 15, 1971, would be to permit a "technical evasion" of the principles established by the 120-day rule, a practice condemned by the court in People v. Ashton (1970), 130 Ill.App.2d 147, 264

N.E.2d 556. The delay in trial between December 29, 1970 and January 15, 1971 was in part occasioned by the defendant, although noted by the court as a "Motion State" and even though not expressly objected to by the State as having been attributed to it by the court. See People v. Ashton, See also People v. Fosdick (1967), 36 Ill.2d 524, 224 N.E.2d 242; People v. Bagato (1963), 27 Ill.2d 165, 188 N.E.2d 716. At the time defendant filed his petition for discharge a period of less than 120 days had elapsed from the date he was taken into custody, in light of the delays "occasioned by" his motions for continuances made on December 29, 1970, and on March 3, 1971, and thereafter.

The cases cited by the defendant do not support his position or are inapposite: People v. Rice (1970), 122 Ill. App.2d 329, 258 N.E.2d 841; People v. Anderson (1973), 53 Ill.2d 437, 292 N.E.2d 364.

In light of the foregoing, it is unnecessary to consider the State's position that because defendant was released from custody on February 5, 1971 he was subject to the provisions of subsection (b) rather than subsection (a) of section 103-5 of the Criminal Code.

The judgment of the circuit court of Cook County is accordingly reversed and the cause is remanded for further proceedings not inconsistent with the views expressed herein.

Judgment reversed and cause
remanded with directions.

Third Division.

57632

PEOPLE OF THE STATE OF ILLINOIS,)	
	)	APPEAL FROM THE CIRCUIT
Plaintiff-Appellee,)	
	)	COURT OF COOK COUNTY.
vs.)	
	)	HONORABLE
BEATRICE BYRD,	)	MARVIN E. ASPEN,
	)	PRESIDING.
Defendant-Appellant.)	

PER CURIAM:

The defendant, Beatrice Byrd, was indicted for the unlawful possession of heroin in violation of section 22-3 of the Criminal Code (Ill.Rev.Stat. 1969, ch.38,par.22-3). After a bench trial the defendant was found guilty and sentenced to one to two years to the Illinois State Reformatory for Women.

On appeal the defendant argues that the trial court wrongfully refused to order the disclosure of the informer, and that the sentence of one to two years was excessive.

Prior to trial the defendant filed a motion for the production of the informer. The trial court denied said motion, but without prejudice to again raise it later in the proceedings.

At the trial Chicago Police Officer James Arnold testified that on February 6, 1971, he and his partner, Charles Jackson, approached the defendant who was with a man in a car parked at 6537 South Stewart Avenue, Chicago. The defendant was on the passenger side of the car. The officers asked both occupants to step out of the car and Officer Arnold observed a brown envelope in defendant's outside coat pocket partly covered by her left hand. He testified that as the defendant was getting out of the car, she said the driver, Pete Stonette, also known as Henry Stonette, was not involved; that he had no knowledge of heroin being on her person; and that it was her car. Officer Arnold looked inside the brown envelope and observed what he thought was heroin. He then took the envelope to the office and inventoried it.

It was stipulated that the envelope Arnold took from the defendant contained 17.9 grams of heroin.

The defendant testified that she was 51 years old and an ordained spiritual minister; that she was in the parked car with Henry Stonette when the arresting officers passed the car in their squad car and then backed up; and that as the policemen were backing up, Henry Stonette swore and said the officers were the same ones who had previously arrested him for possession of narcotics. The defendant stated that Stonette put the brown envelope in her pocket; and that she did not know what was in it. She denied making any statements exonerating Stonette to the police officers.

The trial court recalled Police Officer Arnold who testified that an informer had told him 20 minutes before defendant's arrest that he had just purchased narcotics from the defendant. The informer did not say whether or not Stonette was present when he, the informer, was with the defendant.

At the close of the evidence, defendant renewed her demand for disclosure of the informer as a material witness to the issue of guilt or innocence. In the alternative, the defendant requested an in camera examination of the informer by the trial court. Denying defendant's request for production of the informer at the trial, the trial court found the defendant guilty of the crime charged, but continued the post-trial motions and the hearing on aggravation and mitigation for the trial court's in camera interview with the informer.

At a hearing held on March 29, 1972, Officer Arnold testified that he was unable to locate the informer. The defendant requested a continuance so that further effort could be made to locate the informer. The trial court denied defendant's request and stated that an in camera examination of the informer was not needed. The trial court thereupon denied defendant's motion for a new trial.

The defendant, relying on the case of Roviaro v. United States (1957), 353 U.S. 53, 77 S.Ct. 623, 1 L.Ed.2d 639, argues that where an informer is a necessary witness as to the guilt or innocence of the defendant, the informer must be available to the defendant.

In the case at bar, the trial court relied on the case of People v. Quinn (1971), 2 Ill.App.3d 341, 276 N.E.2d 379, where the court held (2 Ill.App.3d, p.344):

"Defendant was charged only with the unlawful possession of narcotics, an offense in which the informer in no way participated, and the informer was not present at the time of defendant's arrest or during the search of his person. Hence, it is clear that the identity and testimony of the informer was neither material nor required under the Roviaro case."

Likewise, in the present case, the defendant was charged only with possession of a narcotic drug. The trial court found the defendant guilty of the crime of unlawful possession of a narcotic drug as charged in the indictment. The defendant admitted that she "had possession of narcotics at the moment of her arrest," but contends that it was placed in her possession by Henry Stonette, the driver of the automobile. However, Police Officer Arnold testified that at the time of the arrest the defendant stated Stonette was not involved and that he had no knowledge she had heroin on her person. Further, the record discloses that the informer was not present at the time of the arrest. Police Officer Arnold testified that the informer told him about 20 minutes before the arrest of the defendant that the defendant had heroin in her possession. However, the informer did not say whether or not Stonette was present when he, the informer, was with the defendant. Under such circumstances it was Stonette, and not the informer, who knew how the defendant "had possession of narcotics at the moment of her arrest." He was in a position to state whether he placed the heroin in the pocket of the defendant just prior to the arrest of the

defendant. The Quinn case is controlling in the case at bar.

The defendant quotes from the recent case of Branzburg v. Hayes (1972), 408 U.S. 665, 92 S.Ct. 2646, 33 L.Ed.2d 626, to the effect that the identity of the informer cannot be concealed from the defendant when it is critical to the defendant's case. However, the defendant has neglected to quote the last sentence. The entire quote reads as follows (33 L.Ed.2d, p.649):

"Such informers enjoy no constitutional protection. Their testimony is available to the public when desired by grand juries or at criminal trials; their identity cannot be concealed from the defendant when it is critical to his case. Roviaro v. United States, supra, at 60-61, 62, 1 L Ed 2d at 644-646; McCray v. Illinois, 386 U.S. 300, 310, 18 L Ed 2d 62, 70, 87 S Ct 1056 (1967); Smith v. Illinois, 390 U.S. 129, 131, 19 L Ed 2d 956, 958, 88 S Ct 748 (1968); Alford v. United States, 282 U.S. 687, 693, 75 L Ed 624, 628, 51 S Ct 218 (1931). Clearly, this system is not impervious to control by the judiciary and the decision whether to unmask an informer or to continue to profit by his anonymity is in public, not private, hands. We think that it should remain there and that public authorities should retain the options of either insisting on the informer's testimony relevant to the prosecution of crime or of seeking the benefit of further information that his exposure might prevent."

In the instant case, the defendant was charged and found guilty of only the possession of heroin. Moreover, the informer was not present at the time of the arrest. Therefore, the testimony of the informer could not possibly be critical to the defendant's case. The trial court properly denied the defendant's motion for a disclosure of the informer or for an in camera examination of said informer.

In a bench trial in a criminal case, the determination of the credibility of the witnesses and the weight to be given their testimony is committed to the trial court and a reviewing court will not set aside a guilty finding unless the proof is so unsatisfactory, improbable or implausible as to justify a reasonable doubt as to the

defendant's guilt. People v. Roti (1971), 2 Ill.App.3d 264, 271, 276 N.E.2d 480; People v. Bracey (1970), 129 Ill.App.2d 57, 62, 262 N.E.2d 748; People v. Catlett (1971), 48 Ill.2d 56, 64, 268 N.E.2d 378.

The defendant also argues, without citation of authority, that the trial court erred in not granting her application for probation.

The allowance of probation was within the discretion of the trial court, and its determination is subject to review to the extent of ascertaining whether the trial court did, in fact, exercise discretion or whether it acted in an arbitrary manner. (People v. Saiken (1971), 49 Ill.2d 504, 514, 275 N.E.2d 381, U.S. cert. den. 405 U.S. 1066; People v. Henderson (1971), 2 Ill.App.3d 401, 276 N.E.2d 372; People v. Velez (1972), 6 Ill.App.3d 466, 468-469, 285 N.E.2d 251.) In People v. Winters (1971), 1 Ill.App.3d 533, 275 N.E.2d 220, the court held that a reviewing court should not modify a sentence unless it is manifest that it is excessive; and that the power to reduce a sentence should be exercised with considerable caution and only in those cases where the penalty constitutes a substantial departure from the spirit and purpose of fundamental law.

In the case at bar the defendant was found guilty of possession of a narcotic drug, namely, 17.9 grams of heroin and, therefore, it cannot be said that the sentence was excessive or that the trial court abused its discretion when it denied probation and sentenced defendant to one to two years.

There is no error in the record, and, therefore, the judgment of the trial court is affirmed.

Judgment affirmed.

Third Division.

57809

THE PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Plaintiff-Appellee,	)	Appeal from the Circuit
)	
v.	)	Court of Cook County.
)	
	)	Honorable
LAURENCE FISCHER,	)	Arthur V. Zelezinski,
	)	Presiding.
Defendant-Appellant.))	



PER CURIAM:

Laurence Fischer, the owner of a drug store located at 1100 North Dearborn St., Chicago, was convicted after a bench trial of the sale of depressant drugs (Ill.Rev.Stat., 1969, ch. 111-1/2, par. 802(b)). Defendant was placed on probation for a period of two years with the condition that he serve the first 60 days in Cook County Jail. On appeal, the defendant argues that he was not proven guilty beyond a reasonable doubt, that the trial court erred in admitting improper testimony as to irrelevant and prejudicial matters, and that the trial court erred in denying his motion to suppress the evidence.

At the motion to suppress and at trial, the following evidence was adduced: Donald Senace, a Chicago Police investigator, testified that on December 13, 1970, in response to a call, he investigated an overdose of narcotics involving one James Meitzler. At that time, Officer Senace had a conversation with Meitzler's parents and James Schaeffer. Schaeffer was searched and found to be

free of money or narcotics and was given ten dollars in pre-recorded funds. Officer Senace then followed Schaeffer to the 6400 block of N. Magnolia where he observed Raymond Kersting enter Schaeffer's automobile. Kersting and Schaeffer then proceeded to the drug store located at 1100 N. Dearborn Street, Chicago, Illinois. While Schaeffer remained in the car, Kersting entered the drug store. A short time later, Kersting left the drug store, followed by Officer Mays. Officer Mays then gave Officer Senace a pre-arranged signal, which meant that Kersting had made a purchase of contraband in the drug store. Kersting walked down the alley where he re-entered Schaeffer's automobile. As the car started to pull away, Officer Senace pulled alongside the vehicle and placed the occupants under arrest. A search revealed pills on the floor of the vehicle and more pills in a brown bottle in Kersting's waistband and pocket. One hundred pills were recovered and sent to the Chicago Police Crime Laboratory. Defense counsel stipulated to the laboratory report which disclosed that 100 blue and red capsules which were sent to the Chicago Police Crime Laboratory were tested by Chicago Police chemist, Dorothy Wagner, and were found to be a derivative of barbituric acid, a dangerous drug.

George Mays, a Chicago Police investigator, testified that on December 13, 1970, at approximately 7:00 P.M., he arrived at 1100 N. Dearborn Street, Chicago, Illinois. At approximately 7:40 P.M., he observed Ray Kersting enter the drug store at that address. Officer Mays followed Kersting into the store and began to browse around. Kersting proceeded to the cash register and had

a short conversation with the defendant. Defendant then took a brown bottle, placed it into a bag and handed it to Kersting, who in turn gave money to the defendant. Kersting then left the drug store and Officer Mays followed. Outside the drug store, Mays had a conversation with other officers who informed him that the suspect contraband had been recovered. Officer Mays then re-entered the drug store, placed the defendant under arrest and conducted a search of the cash register which disclosed five, one dollar bills of the pre-recorded funds.

James Meitzler testified that between December 1, 1970, and December 13, 1970, he had purchased capsules on several occasions from Kersting. The last purchase was made on December 12, 1970. The pills were red and blue in color.

James Schaeffer testified that on December 13, 1970, he met Officers Senace and Mays and was given ten dollars in pre-recorded funds. He then proceeded to the north side of Chicago where he met Ray Kersting. He gave the ten dollars in pre-recorded funds to Ray Kersting. He proceeded with Kersting to the drug store at 1100 N. Dearborn, Chicago, Illinois. When they arrived at the drug store, Kersting left the car and returned approximately five minutes later. Shortly thereafter, Officer Senace pulled alongside and placed them under arrest, recovering certain pills from the back seat of the vehicle where Kersting was seated.

Ray Kersting testified that he had purchased drugs from the defendant prior to December 13, 1970, on several occasions.

The drugs he purchased were commonly referred to as "trees." On December 13, 1970, in the morning he purchased several "trees" from the defendant. Subsequently, he met Schaeffer, who gave him ten dollars, and he returned to the drug store to purchase more "trees." Upon entering the store, he informed the defendant that he wanted to buy 100 "trees." He gave the defendant the money and the defendant gave him the capsules. He left the drug store and entered the automobile where Schaeffer was waiting. A short time later, he was placed under arrest by Officer Senace. The pills which Officer Senace discovered in the automobile were the same pills he had purchased from the defendant, Fischer.

Laurence Fischer testified that he is the owner of the drug store and that on December 13, 1970, Kersting came into his store and purchased a quantity of blue and red sleeping pills which were sold without a prescription. He denied that he sold any form of depressant drug to Kersting.

In rebuttal, Donald Senace testified that after Kersting left the drug store, he was under observation at all times until he was placed under arrest. As a result of the defendant's arrest and search of the vehicle, Officer Senace discovered no other drugs other than those sent to the Chicago Police Crime Laboratory. A laboratory analysis of the one hundred pills sent to the Crime Laboratory disclosed that the pills were a derivative of barbituric acid or a dangerous drug.

Defendant's first argument on appeal is that he was not proven guilty beyond a reasonable doubt because the State failed to

establish that the drug was a depressant drug. The statute in effect at the time of the commission of the crime in the case at bar defined a depressant or a stimulant drug (Ill.Rev.Stat., 1969, ch. 111-1/2, par. 801(f)):

"1. Any drug which contains any quantity of (a) barbituric acid or any of the salts of barbituric acid or (b) any derivative of barbituric acid which has been designated by lawful regulations of the superintendent or attorney general as habit-forming."

To sustain a conviction under this statute, which is no longer in effect, it was necessary for the State to prove that the drug was barbituric acid or was a derivative of barbituric acid which had been designated by lawful regulations of the superintendent or attorney general as habit-forming. In the case at bar, the defendant stipulated to the laboratory analysis which showed that the capsules contained a derivative of barbituric acid. There was no evidence introduced that this form of barbituric acid has been designated by the superintendent or the attorney general as habit-forming. The evidence was not sufficient to establish that the capsules were a depressant drug as then defined by statute.

Based upon the conclusion we have reached as to defendant's first argument, it is unnecessary to consider defendant's additional arguments.

For the foregoing reasons, the judgment of the Circuit Court of Cook County is reversed.

Reversed.

Third Division: Justice Schwartz did not participate.



58195
58196

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Plaintiff-Appellee,	)	APPEAL FROM THE CIRCUIT
)	
vs.	)	COURT OF COOK COUNTY.
)	
RONNIE IRVING and EARL PASS,	)	Hon. Thomas P. Cawley,
	)	Presiding.
Defendants-Appellants.)	

PER CURIAM:

Ronnie Irving and Earl Pass, defendants, were charged by complaint with aggravated battery in violation of section 12-4(a) of the Criminal Code. Ill.Rev.Stat. 1971, ch.38, par.12-4(a). After a bench trial, they were each found guilty and sentenced to a term of one year at Vandalia. On appeal, defendants argue that they did not knowingly and understandingly waive their right to a jury trial and that the trial court erred in denying defendant Irving's request for a continuance.

Defendants were originally charged by complaint with aggravated battery as a felony. On August 2, 1972, the case was called for trial and the public defender was appointed to represent both defendants. Defendant Pass was in custody and defendant Irving was free on bond. After a recess to allow the public defender to confer with both defendants, the public defender, as to defendant Pass, answered, "Ready for trial, plea not guilty, waive trial by jury." As to defendant Irving, the public defender requested a continuance to bring in alibi witnesses. The trial judge responded that the case had been continued on three occasions for a period of over two months, during which defendant Irving was free on bond. He also stated that at 9:30 a.m. and 10:00 a.m. he had announced to every person in the courtroom that they could obtain a continuance at that time if they desired to do so. Defendant Irving did not respond. The trial judge stated that it was now 2:45 p.m. and that the witnesses had been waiting all day. He stated that he felt defendant

Irving's request was an excuse in order to delay the orderly process of the court. The motion for a continuance was denied. The assistant public defender representing defendant Irving then stated, "Plea not guilty, waive trial by jury." The prosecutor amended the aggravated battery complaint to charge a misdemeanor and not a felony. Defense counsel specifically stated that he had no objection to the amendment.

The evidence adduced at trial is summarized: on May 28, 1972, at 1101 South Throop Street, Chicago, Illinois, the complainant, Mr. Louis Davis, was attacked by a group of approximately 15 men. Defendants Pass and Irving were part of that group. Defendant Pass hit Mr. Davis in the head with a .32 caliber revolver. As Mr. Davis attempted to get up from the ground, defendant Irving kicked him in the head. As a result of the incident, Mr. Davis spent over one week in the hospital and suffered a broken nose.

Defendants' first argument on appeal is that they did not knowingly and understandingly waive their right to a jury trial. In People v. Sailor (1969), 43 Ill.2d 256, 253 N.E.2d 397, the Supreme Court held that an accused ordinarily speaks through his attorney and that by permitting his attorney in his presence and without objection to waive the right to a jury trial, a defendant is deemed to have acquiesced in and be bound by his counsel's conduct. The court stated that the trial court is entitled to rely upon the professional responsibilities of defense counsel and that a defendant will not be permitted to complain of an alleged error which he has invited by his own behavior and that of his counsel. The rule as announced in Sailor is also applicable to court-appointed counsel. People v. McClinton (1972), 4 Ill.App.3d 253, 280 N.E.2d 795.

In the case at bar, the defendants seek to avoid the doctrine of Sailor by arguing that when their attorney in

open court announced, "Plea of not guilty, waive trial by jury," they were charged with a felony. Thereafter, the assistant State's Attorney amended the complaints to charge the same offenses but as misdemeanors. Defendants now urge that since nothing was said by defense counsel as to a waiver of a trial by jury after the complaints were amended, there was no valid jury waiver as to the misdemeanor charges.

In People v. Miles (No. 56807, July 13, 1973), -111.

App.3d-, the defendant was charged by complaint with unlawful use of weapons as a felony. When the case was called for trial, defense counsel stated, "Not guilty, jury waived, trial by this court." After all the witnesses testified, the trial court entered a finding of guilty. The assistant State's Attorney then noted that the unlawful use of weapons charge was filed as a felony rather than as a misdemeanor. Without objection by defense counsel, the assistant State's Attorney amended the complaint to state a misdemeanor. Defense counsel then stipulated that the proof on the misdemeanor would be identical to that of the felony. The trial court entered a finding of guilty as to the misdemeanor. On appeal, defendant argued that since his attorney did not indicate a jury waiver after the assistant State's Attorney amended the complaint to charge a misdemeanor, there was no valid jury waiver on that charge. In rejecting this contention, this court said:

"In light of the foregoing, it is apparent that defendant's jury waiver under the felony complaint applies with equal force to the misdemeanor complaint."

In the present case, the record demonstrates that after the appointment of the public defender, the case was passed to allow the defendants an opportunity to confer with counsel. At that time, the trial judge stated that the case would go to trial that day. When the case was recalled, defense counsel expressly stated that there was waiver of a

jury trial as to each defendant. The prosecutor then made a motion to amend the complaints to charge a misdemeanor and defense counsel specifically stated that he had no objections. The substance of the charges remained unchanged. Defense counsel obviously knew of the prosecutor's proposed amendment of the charge before the matter was recalled and it may be concluded, as it was in Sailor, that such matters were discussed in counsel's conference with the defendants. Defense counsel's statement that there was a plea of not guilty and a waiver of a trial by jury was valid jury waiver binding upon defendants.

Defendant Irving also argues that the trial court improperly denied his request for a continuance in order to bring in alibi witnesses. Motions for a continuance are addressed to the discretion of the trial court. (People v. Clark (1956), 9 Ill.2d 46, 137 N.E.2d 54.) A reviewing court will not interfere with the trial court's denial of a defendant's request for a continuance unless the trial court has abused its discretion. People v. Summers (No. 55689, June 14, 1973), --Ill.App.3d--.

In the instant case, the crime had occurred on May 28, 1972. On August 2, 1972, when the case was called for trial, defendant Irving had been free on bond for over two months. The case had been continued on three prior occasions. On July 18, 1972, the case was continued until August 2, 1972, upon motion of defendant Irving. At 9:30 a.m. and 10:00 a.m., the trial judge announced to everyone in the courtroom that anyone who wished a continuance could obtain one at that time. Defendant Irving did not respond. The public defender was appointed to represent defendant Irving and at that time there was no mention of a continuance. The trial judge at that time stated, "We'll go to trial today." It was only at 2:45 p.m. when the case was recalled and a trial was imminent that defendant Irving for the first time stated

that he wished a continuance for the purpose of bringing in witnesses. Defense counsel's conduct at trial demonstrates that he was obviously prepared. Under these circumstances, the trial court did not abuse its discretion in denying defendant's motion for a continuance.

For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed.

Judgment affirmed.

Third Division.

58617

PEOPLE OF THE STATE OF ILLINOIS,)	
EX REL. ALFRED VINSON,	)	APPEAL FROM THE CIRCUIT
)	
Relator-Appellant,	)	COURT OF COOK COUNTY.
)	
vs.	)	HONORABLE
	)	RICHARD J. FITZGERALD,
JOHN J. TWOMEY, ET AL.,	)	PRESIDING.
)	
Respondent-Appellee.)	

ABST.

PER CURIAM:

Relator, Alfred Vinson, was found guilty of the offense of murder, attempt murder and armed robbery and was sentenced to terms of years in the penitentiary. Those convictions were upheld on direct appeal to this court in People v. Vinson (1969), 116 Ill.App.2d 21, 253 N.E.2d 21. Relator subsequently filed a pro se petition for writ of habeas corpus which was dismissed on motion of the respondent. Relator appeals.

The Public Defender of Cook County was appointed counsel for relator on appeal and has filed in this court a motion for leave to withdraw as appellate counsel. The motion is supported by a brief pursuant to Anders v. California (1967), 386 U.S. 738, which recites that the sole issue which may be raised on appeal is whether relator was afforded procedural due process in his habeas corpus hearing. The brief concludes that the trial court did not abuse its discretion in dismissing the habeas corpus petition. Relator was forwarded copies of the motion and brief and was allowed additional time to file any points he desired in support of the appeal; he has not responded.

The sole ground raised by relator in support of his petition for writ of habeas corpus is that the foremen of the grand juries which returned the indictments against him, and the State's Attorney of Cook County, failed to sign the indictments so returned, as required by statute. (Ill.Rev. Stat. 1965, ch.38, par.112-4(c).) Relator's references in the petition relate to copies of the indictments, whereas the originals of the indictments, as fact admitted by relator's counsel at the hearing on the motion to dismiss the petition, were signed by both the foremen of the grand juries and the

State's Attorney of Cook County. This question was considered in the recent case of People ex rel. Keyes v. Twomey (1st Dist., No. 58412, September 24, 1973), -Ill.App.3d-, and was found to have presented no issue upon which the trial court could have granted relief under the habeas corpus statute. Ill.Rev.Stat. 1971, ch.65,par.22. (People ex rel. Jefferson v. Brantley (1969), 44 Ill.2d 31, 253 N.E.2d 378; People ex rel. Skinner v. Randolph (1966), 35 Ill.2d 589, 221 N.E.2d 279.) We are in agreement with appellate counsel's position that the trial court did not abuse its discretion in dismissing relator's petition for writ of habeas corpus.

Upon independent review of the instant record, as is our duty under the Anders decision, this court has found no additional matters upon which an appeal in this case can be grounded. The relief requested in the petition for writ of habeas corpus cannot stand as relief requested under the post-conviction statute, pursuant to the dictate of People ex rel. Palmer v. Twomey (1973), 53 Ill.2d 479, 292 N.E.2d 379, since no violation of relator's constitutional rights are alleged therein. Further, relator presently has an appeal pending in this court from an adverse decision rendered in a post-conviction proceeding involving the instant convictions.

The appeal is frivolous and wholly without merit. The motion of the Public Defender of Cook County for leave to withdraw as appellate counsel is accordingly allowed, and the judgment of the circuit court of Cook County is affirmed.

Motion allowed.
Judgment affirmed.

Third Division.

v.

Respondent-Appellee.

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of his appeal. He has not responded.

As pointed out in counsel's petition and brief, habeas corpus is available only where a defendant is in custody under a judgment where the trial court lacked jurisdiction or where something has happened since the defendant's incarceration which would entitle him to relief. People ex rel. Jefferson v. Brantley, 44 Ill.2d 31, 253 N.E.2d 378; People ex rel. Skinner v. Randolph, 35 Ill.2d 589, 221 N.E.2d 279. Habeas corpus is not available to attack alleged error of a non-jurisdictional nature. People ex rel. Lewis v. Frye, 42 Ill.2d 58, 245 N.E.2d 483; People ex rel. Rose v. Randolph, 33 Ill.2d 453, 211 N.E.2d 685.

The sole issue raised by Peck in his petition for a writ of habeas corpus relates to the failure of the Grand Jury foreman and State's attorney to sign the murder indictment upon which he was convicted. Peck's references to the indictment in his petition referred to copies of the indictment. At the hearing on the State's motion to dismiss, defense counsel specifically stated that he had personally checked the original indictment and it was in fact signed by the State's attorney and foreman of the Grand Jury. This ground consequently presented no issue upon which the trial court could have granted relief under the habeas corpus statute. People ex rel. Keyes v. Twomey, Ill.App.3d , N.E.2d (No. 58412, decided September 24, 1973). Peck's petition does not properly relate to the jurisdiction of the trial court or to matters occurring since his detention which would entitle him to relief and it was properly dismissed by the trial court.

After a full examination of all the proceedings in accordance with the dictates of Anders, we concur in the opinion of the public

defender that the points raised are not arguable on their merits and that an appeal is wholly frivolous. Our inspection of the record does not disclose any possible grounds for an appeal which would not also be frivolous.

Accordingly, the public defender of Cook County is granted leave to withdraw as counsel for relator on appeal and the judgment of conviction is affirmed.

Petition allowed;
judgment affirmed.

THIRD DIVISION: Justice Schwartz did not participate.

57695

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM CIRCUIT
	)	COURT OF COOK COUNTY.
Plaintiff-Appellee,)	
)	
v.)	
)	
ROY VALADEZ,	)	HONORABLE
	)	SAUL A. EPTON
Defendant-Appellant.)	)	PRESIDING.



PER CURIAM* (FIRST DISTRICT, FIFTH DIVISION):

Defendant, Roy Valadez, pleaded guilty to a two-count indictment charging him together with co-defendants William B. Zerkel, Charles P. Kennedy and Gene Verbeck with aggravated kidnapping and aggravated battery. The sole appellant here, defendant Valadez, was sentenced to concurrent terms of five to ten years in the Illinois State Penitentiary (Ill. Rev. Stat. 1969, ch. 38, par. 10-2, par. 12-4). He appeals contending (1) that his sentence was excessive and should be reduced because of judicial prejudice, improper denial of request for a continuance of the hearing on mitigation and aggravation and the improper admission into evidence at the hearing in aggravation and mitigation of a tape recording; (2) that the court erred in imprisoning him while granting probation to co-defendants; and (3) that his conviction for aggravated battery was for the same acts which constituted the offense of aggravated kidnapping and therefore constituted double jeopardy.

On February 1, 1972, the defendant, represented by Saul Perdomo, agreed to a pretrial conference. Mr. Perdomo objected to a co-defendant's motion that the case be continued, stating: "If I may for professional reasons I would like to terminate the case today, if possible." After the conference, defendant's attorney stated that defendant wished to enter a plea of guilty to the charge and "throw himself on the mercy of the Court." The plea was accepted and judgment entered on the finding of guilty.

*Justice Sullivan did not participate.

At the change of plea hearing Inspector John Buzinski of the Chicago Police Department testified as to the facts of the case: On September 9, 1971, he was assigned to investigate the kidnapping of Robert J. Colwell. During the course of this investigation Colwell related to him that on September 7, 1971, he was at 5300 north at the lakefront leaving the beach area when two unknown males approached him and put something into his side which he believed to be a gun, told him to walk to a car, blindfolded him and left. He was taken to the apartment of Barbara Hendricks and defendant where he was questioned about \$250,000 of hallucinogenic pills. He was beaten and tortured at the apartment. Later that evening he was taken to a wooded area and beaten again. Subsequently he was taken to a garage, put into another car, handcuffed to the car and forced to spend the evening in the garage. The next day he was driven around the city, taken to another wooded area and beaten, and later that evening (September 8) taken back to the apartment where he was again beaten and tortured. He was taken out of the apartment still later that night and handcuffed to a bench in a garage until the next morning when he made his escape. The victim picked a photo of defendant out of several shown to him as one of the people who approached him at the beach. Conversation with Donna and Judy Hendricks revealed that they had listened to a tape recording of the incidents that occurred in the apartment of defendant and Barbara Hendricks during the time of the kidnapping.

Robert Colwell testified: He had been blindfolded when abducted and therefore could not say what injuries each of his kidnappers inflicted upon him. However, he was certain that defendant was present when he was beaten because he recognized his voice. He had met defendant once before. Defendant told him to keep his head down when he was first kidnapped. He turned

around, saw defendant's face and recognized him. At one point he was burned with cigarettes and cigarette fluid. None of his abductors left the scene while this was being done.

Other witnesses were present in court and prepared to testify, one of whom had taken the license number of the kidnapper's car and was able to identify defendant.

The court then accepted defendant's plea of guilty to both counts and entered judgment. The judge stated that before proceeding with aggravation and mitigation, he would order a "thorough and complete investigation of the background" of the defendants.

On February 15, 1972, Louis DeLeonardis appeared for defendant stating that Mr. Perdomo was in Florida and asked for a continuance on the ground that he knew very little about the defendant or his family, which request was denied. Mr. DeLeonardis was given a copy of the pre-sentence report and the matter was continued until 2:30 over DeLeonardis' objection. As to the reasons for denying the continuance, the judge stated:

"All right. This matter will be continued to this afternoon somewhere in the neighborhood of 2:00 to 2:30, as soon as we finish these other matters. I'm sorry. Do not ask for any continuances, because I will not grant it. It was specially set for sentencing. And I am not going to ask twenty people to come back at another time because one man apparently has some other matters. And I am terribly sorry. But you can use my phone. You can call long distance. And you can tell them that I am holding you here or whatever reason you say. And I will verify it."

At 2:30 in the afternoon of February 15, 1972, when court reconvened, the judge granted defendant's motion to strike the last page of the pre-sentence report, "the FBI sheet," on the ground that arrests as opposed to convictions were improper matters to be considered in aggravation, which motion was granted, the court commenting:

"Let the record show that I have not read the arrest record of Mr. Valadez. Counsel, what I know about Mr. Valadez, I can't dismiss from my mind."

"MR. DE LEONARDIS: Certainly not, your Honor, but I know that to the best of your ability, you will nonetheless be fair."

In aggravation the State reviewed the facts of the case and noted defendant's three prior felony convictions and that he was currently on probation. Robert Colwell was then sworn and, over objection of defendant, the tapes on which an audio record of some of the batteries inflicted on Colwell were made were played.

In mitigation defense counsel noted that defendant voluntarily admitted his guilt and pointing to the "brutality" of the case suggested psychological examination and treatment as an alternative to incarceration.

Defendant then addressed the court and admitted he did most of the talking on the tapes. He claimed, however, that at "vital points" someone else's voice was on the tape. Arguing that "my record doesn't have any violence at all in it," he elicited the remark from the judge that, "I know a 'snow job' when I'm getting it." The judge stated that "this whole incident" indicated defendant was a "007," a "James Bond," and concluded, "I blame you for being the number one director of this whole business. You are the active participant. The rest were passive participants."

Opinion

Defendant first argues that certain remarks of the trial judge indicate he was prejudiced against him. After ordering the deletion of defendant's arrest record from the pre-sentence report, the judge commented: "What I know about Mr. Valadez, I can't dismiss from my mind." However, by granting the motion and by subsequent remarks in the record, the judge made it clear that he based his sentencing upon defendant's three prior felony convictions and on his role as leader of the group that carried out the kidnapping and aggravated battery in question. The court's comment on defendant's explanation of his part in the affair as a "snow job"

is proper comment by the judge about whether he felt the defendant was telling the truth. People v. Carroll, 76 Ill. App. 2d 9, 221 N.E.2d 528, cited by defendant, is distinguishable in that the judge called a certain witness called by defendant "a liar" and indicated the sentence was based upon his finding that that witness was "a liar." Here the judge sentenced the defendant based on his prior record and on the facts of the crime.

Defendant argues that the court's denial of his motion for continuance contributed to the excessiveness of the sentence. It should be pointed out that the attorney who failed to appear at the hearing in aggravation and mitigation had resisted a continuance on February 1, 1972, "for professional reasons." Defendant's counsel had two weeks to prepare for the hearing in aggravation and mitigation, and the attorney who did appear had all morning and part of the afternoon to read the pre-sentence report and prepare his arguments. The granting of a continuance is a matter within the discretion of the trial court, and before a judgment of conviction will be reversed because of the denial of such a motion, it must appear that the refusal "in some manner embarrassed the accused in preparing his defense and prejudiced his rights." (People v. Solomon, 24 Ill. 2d 586, 589-590, 182 N.E.2d 736.) No showing of abuse of discretion has been made under the facts in this case.

Defendant next argues that the tape recording made by defendants during which they "interrogated" the victim was improperly admitted and was prejudicial. In People v. Ardella, 49 Ill. 2d 517, 276 N.E.2d 302, the defendant, accused of driving while under the influence of intoxicating liquor, argued that it was error to admit into evidence an audio-video tape made at the police station shortly after his arrest, since he had not consented to being filmed nor warned the tape would be used against him. The court found a waiver

of defendant's rights since the tape showed the defendant received the Miranda warnings. In the case at bar the defendant consented and, in fact, made the recordings himself and gave them to a girl friend. Under these circumstances the tape was properly admitted into evidence at the hearing in aggravation and mitigation.

Defendant next argues that his sentence of five to ten years was excessive compared with the five years probation imposed on his co-defendants. It should be noted, however, that (1) defendant was 25 years of age; none of his co-defendants was older than 20; (2) defendant had three prior felony convictions; his co-defendants were all first offenders; (3) defendant was currently on probation; and (4) the judge found defendant to be the leader of the kidnapers. Given the "brutality" involved in this case, as defense counsel himself characterized it, the sentences which were well within the statutory limits were not excessive.

Defendant finally contends that the aggravated battery did not constitute a separate offense and that consequently it was error for the court below to enter judgment against defendant on this charge. We agree. The statute applying to aggravated kidnapping states in pertinent part that a kidnapper is guilty of this offense where he "inflicts great bodily harm or commits another felony upon his victim." (Ill. Rev. Stat. 1969, ch. 38, par. 10-2(a)(3).) Clearly, the aggravated battery is an element of the aggravated kidnapping charge, and a separate conviction for it cannot stand.

Defendant's conviction and sentence for aggravated kidnapping are affirmed. His conviction for aggravated battery is reversed.

AFFIRMED IN PART;
REVERSED IN PART.

Abstract only.

57594



PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM
Plaintiff-Appellee,	)	CIRCUIT COURT
	)	COOK COUNTY.
v.)	
LARRY BROWN,	)	HONORABLE
Defendant-Appellant.	)	ARTHUR DUNNE,
	)	PRESIDING.

Mr. JUSTICE HALLETT delivered the opinion of the court:

The defendant pleaded not guilty to a charge of armed robbery, was tried and found guilty by a jury and was sentenced to from two to five years in the Illinois State Penitentiary.

In defendant's opening brief on this appeal, the issues are stated as follows:

I.

"Whether the trial court committed prejudicial error in overruling defendant's Petition to Suppress Identification?

II.

"Whether the trial court committed prejudicial error in allowing the State to introduce evidence relating to an alleged 'unrelated' act allegedly committed by the defendant, Larry Brown?"

We find these and other contentions to be without merit and affirm the judgment.

On June 18, 1970, Attorney Lewis Levin, returning from lunch to his office building located at 134 North LaSalle Street, Chicago, entered an elevator, which was functioning in a normal manner, and pushed the button for his floor. With Mr. Levin in the elevator was an employee of a messenger service, Mr. Shafton. The car stopped at the second floor and two men entered and pulled revolvers, pointing them at the occupants. Their faces were not covered in any manner, and they conversed with the victims, who offered no resistance. After the robbery, the robbers exited

at the second floor, and Mr. Levin proceeded to his office, where he immediately notified the building management and the police. Within ten minutes, a police officer arrived at the scene, obtained a description of the assailants from Mr. Levin and sent a "flash message" to other units in the district describing the robbers as two male negroes, one with a blue-gray knit shirt and the other with a gray shirt. Within minutes Police Officers Young and Faulkner, in their squad car, then at Lake and Wells Streets, proceeded to Clark and Randolph Streets, some two blocks east of said building, where they observed two men who fitted Levin's description, in an automobile proceeding south on Clark Street. One of the men got out of the car, and the other continued in a circular route through the Loop for about six blocks, followed by the officers. The officers finally arrested the defendant in that automobile, when it returned to Clark and Washington Streets. Immediately after the arrest, the defendant was taken to Mr. Levin's office building, where Mr. Levin viewed the suspect, who was seated in a room with two black policemen in civilian clothes. Mr. Levin identified him, but later, when shown the other occupant of the car, exonerated the companion.

On the evening of the robbery both men were included in a line-up at police headquarters, at which the defendant's attorney was present, and again Mr. Levin identified the defendant and exonerated his companion.

On January 13, 1971, the defendant filed a motion to suppress the identification testimony of any witness, claiming that the procedure used violated the defendant's constitutional rights in being suggestive and because he had not been advised of his right to have an attorney present. The motion to suppress was denied. At the defendant's jury trial, he took the stand

and denied that he had robbed Mr. Levin and that he had ever been in the office building in question, or any others in the area, specifically including one nearby at 180 West Washington Street. The State then introduced, on rebuttal, the testimony of an attorney, Leonard Amari, who testified that he had seen the defendant in the building at 180 West Washington Street on May 28, 1970, three weeks before the incident here involved. Mr. Amari gave no further testimony. The jury found the defendant guilty as charged, and this appeal followed.

I.

As above indicated, the first issue stated in the defendant's opening brief, is:

"Whether the trial court committed prejudicial error in overruling defendant's Petition to Suppress Identification?"

Prior to the trial, the defendant filed a written motion to suppress the identification testimony of "any witness" because "the confrontation violated the Constitutional Rights of defendant," in that:

"1. The identification by the identification witness was induced by the actions of the police. The manner in which the police acted directly caused the identification witness to point out the defendant, in violation of his Constitutional Rights under the Fifth and Fourteenth Amendments of the Constitution of the United States.

"2. Defendant was not advised of his right to have counsel present with him at the time of the police confrontation in violation of his Constitutional Rights under the Sixth Amendment of the Constitution of the United States."

At the hearing on this motion, the following colloquy occurred between Assistant State's Attorney Bolon and defendant's attorney, Thomas J. Farrell:

"MR. BOLON: I would like one point clarified before proceeding and that is by the nature of counsel's motion. As I understand it, he can correct me if I am mistaken, that this protects only the lineup--strike that--only the identification procedure in and of itself. In other words, he is not attacking the probable cause for the arrest of the defendant, is that correct?"

"MR. FARRELL: Not in this motion."

The petition and counsel's arguments were confined to the question of the suggestiveness and exigent circumstances surrounding the on-the-scene confrontation and the subsequent line-up. The trial judge's attention therefore neither considered nor passed upon the question of probable cause for the arrest.

In the argument portion of his brief, however, the defendant's counsel completely abandons the said contention so made in the court below and devotes his entire argument to the citation and argument of cases dealing only with probable cause for an arrest without a warrant. But no challenge of the arrest for lack of probable cause was ever made below, orally or in writing, and it is too late to raise it now for the first time on this appeal. See People v. Harris, 33 Ill. 2d 389, 390-391, 211 N.E. 2d 693; People v. Moore, 43 Ill. 2d 102, 106, 251 N.E. 2d 181; People v. Nilsson, 44 Ill. 2d 244, 246-247, 255 N.E. 2d 432; People v. Burroughs, 10 Ill. App. 3rd 477, 478, 294 N.E. 2d 325; and People v. Browder, 13 Ill. App. 3d 198, ___ N.E. ___.

Even had the issue of probable cause been timely raised, it would have been without merit.

The defendant's arrest apparently was based on five factors. First was the description given by the victim that one of the robbers was a "male Negro, approximately 19 to 20 years old, with a short Afro style haircut, light complexion, wearing a blue (knit) shirt." Second, he was discovered two blocks from the scene five minutes after the crime occurred. Third, when the defendant was first spotted by the officers he was in an automobile with another person who seemed to fit the description of the second robber. Fourth, after the officers spotted the two suspects and the latter recognized the police car, one of the suspects got out of the car while the other (defendant Brown) drove around in a circle while the

officers followed. Fifth, the defendant Brown then returned to the spot near the scene of the robbery where the other suspect had gotten out of the car. He was then arrested.

In our opinion the above furnished probable cause for an arrest without a warrant. In fact, the arresting officers in People v. McCrimmon, 37 Ill. 2d 40, 43, 44, 224 N.E. 2d 822; People v. James, 4 Ill. App. 3d 1042, 1050, 282 N.E. 2d 760; and People v. Payne, 6 Ill. App. 3d 378, 380, 286 N.E. 2d 35; each had less to go on than did the officers in the case now before us.

Moreover, even if the arrest had been illegal, it would not necessarily follow that the identification evidence was inadmissible. See People v. Pettis, 12 Ill. App. 3d 123, 298 N.E. 2d 372.

Furthermore, the defendant's other contention in the trial court (which is not argued here and is probably thereby waived) that the trial court erred in denying the defendant's petition to suppress the identification is likewise without merit.

The line-up was conducted the evening of the offense and consisted of six male Negroes and three female Negroes. Nothing was said by the police to suggest the identification of the defendant and his attorney was present. The line-up was proper. See People v. Dismuke, 3 Ill. App. 3d 553, 557-558, 278 N.E. 2d 152.

There had also been a showup at the robbery scene, about half an hour after the offense. The defendant was arrested about two blocks from the scene and taken immediately to the building where it occurred and placed in the manager's office, with the other male negroes who were plain clothes policemen. Mr. Levin viewed them and said, "That is the fellow."

Such an immediate on-the-scene confrontation is proper and to be encouraged because, if the police have a person who is

not the person involved, he can be released forthwith and the search resumed while the trail is fresh. See People v. Hudson, 46 Ill. 2d 177, 263 N.E. 2d 473, People v. Bey, 51 Ill. 2d 262, 281 N.E. 2d 638; and People v. Elan, 50 Ill. 2d 214, 278 N.E. 2d 76.

Further, since Mr. Levin viewed the robbers during the offense in the elevator in good light, from a foot or so away and the robbers wore no masks, he was positive in his pre-trial identification, thus furnishing sufficient independent origin for his identification (People v. Stringer, 52 Ill. 2d 564, 568, 289 N.E. 2d 631) and there was therefore no "very substantial likelihood of irreparable misidentification." See Neil v. Biggers (1972), 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed. 2d 401.

II.

This brings us to the last issue raised by the defendant:

"Whether the trial court committed prejudicial error in allowing the State to introduce evidence relating to an alleged 'unrelated' act allegedly committed by the defendant, Larry Brown."

Under this point the defendant argues that the trial court committed reversible error by permitting an attorney, Leonard Amari, to testify, on rebuttal by the State over objection, (after the defendant had taken the stand and testified that, although he was in a car in the Loop with his uncle on the day of the robbery, he did not rob Mr. Levin and had never been in that office building or in the nearby building at 180 West Washington Street, in his life), that he saw the defendant in the latter building on May 28, 1970, three weeks before this robbery.

It should be noted that the testimony of the rebuttal witness Amari did not in any way indicate how or why the defendant, contrary to his own testimony, was in the building at 180 West Washington Street on May 28, 1970, three weeks before the date of the incident here involved and such rebuttal testimony did not

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in itself tend to show that the defendant was guilty of another separate crime.

We therefore conclude that this contention is without merit and affirm the judgment.

Judgment affirmed.

Goldberg and Egan, JJ., concur.

58595

PEOPLE OF THE STATE OF ILLINOIS,)	
	)	APPEAL FROM THE
Plaintiff-Appellee,	)	CIRCUIT COURT
	)	OF COOK COUNTY.
vs.)	
)	
RICHARD DAVID SCOTT,	)	HONORABLE
	)	JOHN J. CROWLEY,
Defendant-Appellant.	)	PRESIDING.

PER CURIAM:*

ABST.

Richard David Scott (hereinafter "defendant") appeals from a judgment entered after a bench trial finding him guilty of the offense of battery in violation of section 12-3 of the Criminal Code and sentencing him to a term of six months at the Illinois State Farm. Ill. Rev. Stat. 1971, ch. 38, par. 12-3.

The public defender of Cook County, appointed as defendant's counsel on appeal, has filed in this court a motion supported by a brief pursuant to Anders v. California, 386 U.S. 738, for leave to withdraw as appellate counsel on the ground that the appeal is without merit. Advanced in the supporting brief as issues which could be raised on the appeal but which, counsel concludes in final analysis, are without merit, are (1) whether defendant's identification should have been suppressed, and (2) whether defendant was proved guilty beyond a reasonable doubt. Defendant was forwarded copies of the motion and brief and was allowed additional time within which to file any points he desired in support of the appeal; defendant has not responded.

At the hearing on the motion to suppress the identification, police officer Grailic testified that, about four minutes after he had contact with the complaining witness on an elevated train platform in Chicago and with eyewitnesses who described the assailant, he observed defendant enter a tavern about one-quarter of a city block away; the officer immediately himself

entered the tavern and found defendant hiding under a stairwell in the washroom of the tavern, where defendant was then placed under arrest. Defendant was taken to a waiting police car where he was placed in the rear seat and was promptly identified by the complaining witness as the assailant. The motion to suppress the identification was denied.

Irving Raymond testified for the State at trial that, while he was seated on an elevated train on October 22, 1972, defendant, who had been standing nearby, asked him for a cigarette. The witness stated that he had none, to which defendant replied that he "had better come up with one." The witness testified that he made no response; that he moved in his seat; that defendant kicked him; that he fell to the floor; and that defendant both struck and kicked him in the face. The witness (who was 37 years of age, weighed 140 pounds, and stood five feet - six inches tall) spent five days in the hospital on account of the injuries received, which were a concussion, a broken jaw, and the loss of all his teeth. After the altercation, the witness was placed in a police car from which position he identified defendant a few minutes later as his assailant. The witness did not know defendant prior to the day in question, did not jump up or push defendant when the latter asked for a cigarette, and had had nothing intoxicating to drink immediately prior to the altercation.

Officer Grailic testified that he received a radio communication of a battery in progress on an elevated train; that he received a description of the assailant from bystanders on the platform where the train had stopped; that he observed a person matching that description enter a tavern on the street about one-quarter of a city block away from the elevated station; and that he apprehended defendant under a stairwell in the tavern's washroom, where defendant was then placed under arrest. Defendant was advised of his constitutional rights, stated that he understood those rights, and later commented to the officer that he knew who

the complaining witness was, that he had struck and kicked the latter, and that he would have killed the latter on the train, had he had more time.

Defendant testified in his own behalf and stated that after he had asked the complaining witness for a cigarette and the latter had said that he had none, the latter became abusive and pushed at defendant. Defendant testified that he pushed back at the complaining witness, that the latter stood and swung at defendant, and that defendant then kicked the complaining witness in the stomach. Defendant testified that he did not kick the complaining witness in the head; that he merely pushed the latter in the forehead with the palm of his hand; and that defendant helped the complaining witness up when the latter fell to the floor. Defendant weighed 195 pounds and stood six feet - two inches tall. He also testified that the complaining witness seemed intoxicated at the time.

The foregoing summary of the evidence adduced at the trial and at the hearing on the motion to suppress clearly indicates that neither point raised by appellate counsel in his supporting brief could support an appeal in this case. As to the identification issue, defendant was apprehended within minutes of the offense and only a short distance away, and was identified immediately thereafter by the victim of the beating. This constituted an on-the-scene identification which has been upheld by the courts. People v. Bazzelle, 130 Ill.App.2d 131, 264 N.E.2d 457.

As to the issue of reasonable doubt, the victim and defendant related conflicting versions of the confrontation. The credibility of their testimony was for resolution by the trier of fact, especially in light of the other evidence in the case, such as the extent of the victim's injuries, the relative sizes of the two men, and the like. The account of the occurrence related by the complaining witness, which account the trier of fact

obviously chose to believe, is not unbelievable nor is it so unsatisfactory as to raise a reasonable doubt of defendant's guilt. People v. Novotny, 41 Ill.2d 401, 411-412, 244 N.E. 2d 182.

Upon independent review of the record in the instant case, as required of this court by the Anders decision, one matter has been found which could be raised on this appeal but which again, in final analysis, will not support a plausible appeal: Whether the facts adduced at trial support the complaint filed herein.

The complaint recites that the victim of the battery was one "Irvin L. Raney", whereas the evidence adduced at trial reveals that the victim of the battery was one "Irving Raymond." The complaint was signed "Irving Raney." Under the circumstances, this discrepancy is not fatal to the State's case; involved is a situation calling for application of the doctrine of idem sonans. The pronunciation of the two names results in practically identical sounds and it is reasonable to conclude that the court reporter mistook the former for the latter when testified to at trial. (See People v. Lomax, 126 Ill.App.2d 156, 164-165, 262 N.E.2d 63; People v. Clark, ___ Ill.App.3d ___, ___ N.E.2d ___ (First Dist., #58453, September 13, 1973).) It further does not appear that defendant was in any manner prejudiced by this variance, nor was the variance objected to at trial; he admitted the confrontation with the complaining witness and even testified that he helped the latter to his feet from the train floor. If defendant were to raise this claim on appeal at this late date and under these circumstances, the claim would be frivolous.

No further matter has been found upon independent review of the instant record which could support an appeal in this case. We conclude that the appeal is frivolous and wholly without merit.

58595

For these reasons, the motion of the public defender of Cook County for leave to withdraw as appellate counsel is allowed and the judgment of the circuit court of Cook County is affirmed.

MOTION ALLOWED;
JUDGMENT AFFIRMED.

* SECOND DIVISION, FIRST DISTRICT.
LEIGHTON, J., did not participate.



No. 58723

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM THE
	)	CIRCUIT COURT OF
Respondent-Appellee,	)	COOK COUNTY.
)	
vs.)	
)	
ROBERT MERRIWEATHER,	)	HONORABLE
	)	PHILIP ROMITI,
Petitioner-Appellant.	)	PRESIDING.

PER CURIAM:

On June 7, 1971, Robert Merriweather, hereinafter called petitioner, was found guilty after a jury trial of the offense of armed robbery and sentenced to not less than two years nor more than ten years in the penitentiary. Petitioner appealed and on June 27, 1973, this court affirmed the judgment of conviction (People v. Merriweather, 12 Ill.App.3d 493, ____ N.E.2d ____). On March 17, 1972, while his appeal was pending, petitioner filed a pro se petition pursuant to the Post-Conviction Hearing Act (Ill.Rev.Stat. 1971, ch.38, par. 122-1 et seq). On September 19, 1972, court-appointed counsel filed an amendment to the petition alleging that the petitioner was not effectively apprised of his constitutional right to remain silent because he was under the influence of narcotics at the time of his arrest and was "so high on drugs" that he could not understand or comprehend whatever was said to him at that time; and that he was further denied his constitutional right to a fair trial in that he was denied the full benefit of the Fifth Amendment privilege against self-incrimination, which forbids any comment by the prosecutor "on defendant's not testifying on his own behalf." On December 5, 1972, the amended post-conviction petition was dismissed without any evidentiary hearing. Petitioner appeals from that dismissal.

The Public Defender was appointed to represent the petitioner on this appeal and he has filed a motion to withdraw

under Anders v. California, 386 U.S.738, 18 L.Ed.2d 493, 87 S.Ct. 1396, supported by a brief, on the grounds that an appeal from the denial of the amended post-conviction petition would be without merit and could not possibly be successful. On August 3, 1973, a copy of the motion and brief of the Public Defender was mailed to the petitioner, who was afforded time within which to file any points he desired in support of the appeal. The petitioner has not responded.

A proceeding under the Post-Conviction Hearing Act is a new proceeding for the purpose of inquiring into the constitutional phases of the original conviction which have not already been adjudicated. (People v. Derengowski, 44 Ill.2d 476, 256 N.E.2d 455). Where an allegation has previously been considered and rejected by the court, any reconsideration of the same allegation in a post-conviction proceeding is barred by the doctrine of res judicata. People v. Weaver, 45 Ill.2d 136, 256 N.E.2d 816; People v. Walker, 6 Ill.App.3d 909, 286 N.E.2d 812; People v. Westbrook, 5 Ill.App.3d 970, 284 N.E.2d 695.

Petitioner contends that he was denied his constitutional right to a fair trial because the prosecutor commented "on defendant's not testifying on his own behalf." However, this point was raised and rejected in the petitioner's direct appeal (People v. Merriweather, 12 Ill.App.3d 493, ____ N.E.2d ____) and, therefore, the issue cannot again be raised in the amended post-conviction petition.

The petitioner further alleged that he was an admitted narcotics addict and was "so high on drugs" when he was arrested that he could not understand and comprehend whatever was said to him at the time and, therefore, there was a violation of his

privilege against self-incrimination (Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694). At the hearing on the post-conviction petition, counsel for the petitioner stated:

"The defendant admitted that he was under the influence of drugs at the time he was arrested and allegedly informed of his rights."

Counsel further stated:

"MR. BLACKSTONE: Let me just clarify my position with a short statement.

THE COURT: All right.

MR. BLACKSTONE: When I said the issue was not raised from the record, I'm talking about the issue contained in paragraph 9 of the amended petition.

THE COURT: Yes. I have it now.

MR. BLACKSTONE: At the time the petitioner was arrested, he was under the influence of drugs. I'm saying that that is not an effective appraisal of his constitutional rights."

The contention is based upon a letter which counsel received from the defendant, dated July 20, 1972, which stated in part as follows:

"When I was arrested, I was interrogated while I was on drugs;

"I was so high on drugs it would have been too difficult for them to have informed me of my rights.

"After I was interrogated I was taken to the station to be finger-printed and have (sic.) a picture taken, then I was taken to the hospital and treated for drugs."

This is the only reference in the record that the petitioner's Miranda rights were allegedly violated. The foregoing, together with the statement of counsel at the post-conviction hearing that "the defendant admitted he was under the influence of drugs at the time he was arrested and allegedly informed of his rights", clearly shows that the questioning of the defendant was "on-the-scene questioning" and, therefore,

not subject to the Miranda decision. Miranda v. Arizona, 384 U.S.436, 86 S.Ct. 1602, 16 L.Ed.2d 694; People v. Helm, 10 Ill.App.3d 643, 292 N.E.2d 78.

Furthermore, even if it is assumed that the petitioner was not effectively apprised of his constitutional rights after arrest but before interrogation, there is nothing in the record to show that the petitioner was harmed thereby. Neither the record nor the statement of facts on direct appeal (People v. Merriweather, 12 Ill.App.3d 493, ____ N.E.2d ____) discloses that the petitioner made a written statement, which was introduced into evidence at the original trial. Further, even if the petitioner was under the influence of narcotics to the extent that he could not understand and comprehend what was said to him, and even if his Miranda rights were technically violated, said violation resulted in harmless error. The record fails to disclose that the petitioner was harmed or prejudiced by the alleged violation and, therefore, "a failure to comply fully with Miranda can be classified as harmless error." People v. Kaprelian, 6 Ill.App.3d 1066, 286 N.E.2d 613, Petition for Leave to Appeal denied, 52 Ill.2d 598, certiorari to the United States Supreme Court denied May 29, 1973 (U.S.L.W., Vol.41, p.3624).

We have examined the record and concur in the opinion of the Public Defender that the argument thus raised is not arguable on its merits and is wholly frivolous. Our inspection of the record does not disclose any additional possible grounds for an appeal which are not also frivolous.

For the foregoing reasons, the motion of the Public Defender of Cook County to withdraw as counsel on appeal is allowed and the judgment of the circuit court of Cook County, dismissing the petition, is affirmed.

Motion allowed;
Judgment affirmed.

Third Division.



58040

PEOPLE OF THE STATE OF ILLINOIS,)	
ex rel. GEORGE FOX,	)	APPEAL FROM THE
	)	CIRCUIT COURT OF
Relator-Appellant,	)	COOK COUNTY.
)	
vs.)	
)	
JOHN J. TWOMEY, Warden, Illinois	)	HONORABLE
State Penitentiary, Joliet,	)	JOSEPH A. POWER,
Illinois Branch,	)	PRESIDING.
)	
Respondent-Appellee.)	

PER CURIAM (FIRST DISTRICT, FIFTH DIVISION*):

The relator-defendant, George Fox (hereinafter "defendant"), appeals the dismissal of his petition for a writ of habeas corpus.

Defendant was originally charged by indictment with the crime of murder. After a bench trial he was convicted of the offense of involuntary manslaughter and was sentenced to a term of eight to ten years. Defendant appealed and on May 10, 1971, another Division of this court affirmed the judgment of conviction. People v. Fox, 133 Ill.App.2d 89, 272 N.E.2d 765.

On May 17, 1972, defendant filed a pro se petition for a writ of habeas corpus, alleging that the court was without jurisdiction to convict him of involuntary manslaughter since he was indicted on the crime of murder and was therefore not charged with the crime of involuntary manslaughter. The Public Defender was appointed to represent defendant in the habeas corpus proceeding. Upon motion of the State, defendant's petition was dismissed without an evidentiary hearing.

Defendant wished to appeal and the Public Defender was appointed to represent him, but after examining the case, the Public Defender has filed his petition in this court for leave to withdraw

* JUSTICE DRUCKER took no part.

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however, is a lesser included offense in the crime of murder. People v. Bembroy, 4 Ill.App.3d 522, 281 N.E.2d 389. Where a defendant is charged with murder and there is sufficient evidence adduced at trial which, if believed by the jury, would establish his guilt of manslaughter only, a conviction on the lesser included offense is proper. People v. Latimer, 35 Ill.2d 178, 220 N.E.2d 314. On defendant's direct appeal this court specifically found that the evidence did justify defendant's conviction on the crime of involuntary manslaughter. People v. Fox, 133 Ill.App.2d 89, 272 N.E.2d 765. Defendant's habeas corpus petition, therefore, does not properly relate to the jurisdiction of the trial court or to matters occurring since his detention which would entitle him to release under the statute relied on.

Although not raised by the parties, we take notice of the doctrine announced in the recent case of People ex rel. Palmer v. Twomey, 53 Ill.2d 479, 292 N.E.2d 379. There, defendant appealed the dismissal of his pro se petition for a writ of habeas corpus. The Supreme Court noted that the same lack of legal knowledge which may cause a prisoner to draft an inadequate post-conviction petition may also result in his selecting the wrong remedy to attack his conviction collaterally. The court held that consistent with the intent of the Post-Conviction Hearing Act, as expressed in People v. Slaughter, 39 Ill.2d 278, 235 N.E.2d 566, a salutary result would be achieved if the trial court, upon finding that a pro se petition, however labeled and however inartfully drawn, alleged violations of a petitioner's rights cognizable in post-conviction proceedings, were thereafter to treat the petition for all purposes as a post-conviction petition. In the case at bar, defendant's allegation does not demonstrate a deprivation of constitutional rights cognizable under the Post-Conviction Hearing Act. Therefore,

as appellate counsel. Pursuant to the requirements set out in Anders v. California, 386 U.S. 738, 87 S. Ct. 1396, a brief in support of his petition has also been filed. That brief concludes that an appeal in this case would be wholly frivolous and without merit. A copy of the motion and brief were mailed to defendant on June 20, 1973. He was informed that he had until September 3, 1973, to file any additional points he might choose in support of his appeal. He has not responded.

As pointed out in counsel's petition and brief, the only available grounds for relief under our habeas corpus statute are lack of jurisdiction in the court which entered the judgment of conviction, or some happening since the defendant's detention that would entitle him to release. People ex rel. Jefferson v. Brantley, 44 Ill.2d 31, 253 N.E.2d 378, cert. denied 400 U.S. 834.

In People ex rel. Skinner v. Randolph, 35 Ill.2d 589, 221 N.E.2d 279, the court set forth when habeas corpus may be used:

Due to limitations imposed by the legislature in the Habeas Corpus Act, particularly section 22, (Ill.Rev.Stat. 1965, chap. 65, par. 22,) it has long been held in this State that a court has jurisdiction in a habeas corpus proceeding to direct a release from custody only where the original proceeding or judgment of conviction was void or where something has happened since the detention for rendition of the judgment to entitle a prisoner to his release.

Our review of the record in the case at bar discloses that the trial court did not err in dismissing defendant's petition. Defendant's only allegation in his pro se petition for a writ of habeas corpus was that the court was without jurisdiction to convict him of involuntary manslaughter because the indictment charged him only with murder and not with involuntary manslaughter, and that he had a constitutional right to be specifically indicted for the offense of which he was convicted. Involuntary manslaughter,

as appellate counsel. Pursuant to the requirements set out in Anders v. California, 386 U.S. 738, 87 S. Ct. 1396, a brief in support of his petition has also been filed. That brief concludes that an appeal in this case would be wholly frivolous and without merit. A copy of the motion and brief were mailed to defendant on June 20, 1973. He was informed that he had until September 3, 1973, to file any additional points he might choose in support of his appeal. He has not responded.

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the trial court did not err in failing to treat the pro se petition for a writ of habeas corpus in this case as having been filed under the Post-Conviction Hearing Act.

After a full examination of all of the proceedings in accordance with the dictates of Anders, we concur in the opinion of the Public Defender that the point thus raised is not arguable on its merits and that this appeal is wholly frivolous. Nor does our examination of the record disclose any additional possible grounds for an appeal which are not also frivolous.

The Public Defender is therefore granted leave to withdraw and the judgment of the circuit court is affirmed.

MOTION ALLOWED.
JUDGMENT AFFIRMED.

(Publish Abstract only.)



11-2
15 I.A.³ 772

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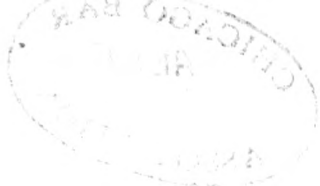
PEOPLE OF THE STATE OF ILLINOIS,)	
)	APPEAL FROM THE
Plaintiff-Appellee,)	CIRCUIT COURT OF
	)	COOK COUNTY.
vs.)	
)	
JOEL VILFRIN,	)	HONORABLE
	)	MARVIN E. ASPEN,
Defendant-Appellant.	)	PRESIDING.

MR. JUSTICE ENGLISH delivered the opinion of the court:

After a bench trial, defendant was convicted of the robbery of Barbara Felt, in violation of section 18 of the Criminal Code. Ill.Rev.Stat. 1971, ch. 38, par. 18-1. On September 28, 1972, defendant was sentenced to five years' probation on condition that the first year be served under the House of Correction Work Release Program. On October 24, 1972, defendant was ordered removed from the Work Release Program, and the five-year period of probation was permitted to stand with imprisonment during the first year. This change appears to have been made upon the basis of statements by jail personnel that defendant had on two occasions not returned on the same day of his release for work, and had been four to six hours late in arriving at the jail on nine occasions.

By the terms of the Notice of Appeal, and within the confines of appellant's brief, defendant's sole contention on appeal is that his identification by a single witness was insufficient to prove his guilt beyond a reasonable doubt.

Detective Michael Gillespi of the Evanston Police Department testified: On January 16, 1972, he responded to an assignment concerning a robbery at 1929 A Sherman Avenue in Evanston. At that time, he spoke with Mrs. Felt and one week later received a phone call from her that she had seen the offender. He picked up Mrs. Felt at her residence and they proceeded to the Dominick's Food Store, three blocks away, and he instructed Mrs. Felt to enter the store and see if she could observe the offender while he waited at the store's entrance. She entered the store, then



stopped and looked at defendant. When Mrs. Felt returned to the store entrance where Officer Gillespi and his partner were waiting, a distance of about 15 yards, defendant, who was working as a packer at a check-out stand, observed Mrs. Felt talking to them; defendant turned, leaving the package on the counter, and walked at a fast pace to the back of the store. The witness apprehended defendant as he was going through the door to the storage room, arrested him, and advised him of his constitutional rights. Defendant responded that he was going on a break. The physical description that Mrs. Felt had given of her attacker was a Negro male, muscular build, approximately age 25, 5'9" tall. She had further described him as having smooth face and hands, medium accent like a British accent, wearing a beige coat and a blue sweater with a hood. She did not indicate anything about the offender having scars or gold fillings in his two front teeth, but did say that he could have been younger than 25 years, around school age. She was shown about 1000 pictures in the police files and pictures of all black males attending Northwestern University, but she identified none of them.

In the course of his investigation, he found that defendant's time card indicated he had punched in for work at 11:00 A.M. on January 16, 1972.

Barbara Felt testified: On January 16, 1972, at approximately 10:30 in the morning, she was leaving her apartment to go to her car. She walked across the street in between two houses to the back of the yard where the car was parked, and as she was approaching her car, she saw defendant out of the corner of her eye walking toward her as she was getting into the car. As she put the key in the ignition, defendant pushed her across the front seat; she tried to let herself out the passenger side, but defendant grabbed her and held her and closed the door. He asked for some money and she gave him her wallet. He took the money out (ten to fifteen dollars) and threw the wallet to the ground. She asked him for

some of her identification and he gave her this, but kept the wallet. He said she must have some more money and told her to take her shoes off, but she said she had no money in her shoes and he then told her to get in the back seat. When she protested, he hoisted her over and threw her into the back seat, jumped into the back seat on top of her and kissed her a couple of times and told her not to tell what had happened and pushed her onto the floor and left. The lighting conditions were bright, it was daylight, she had on her contact lenses so she had 20-20 vision. Defendant's voice was unusual, he spoke "with a kind of British accent, in a very, sort of dignified way." On January 22, 1972, she saw defendant lining up carts at the Dominick's Food Store in Evanston. She went home and telephoned the police and returned and identified defendant, who was then arrested. On that day she positively identified defendant, remembered his voice from the attack, and brought charges against him. She did not see a weapon, but at one point he said that he had a gun and at another time said he had a knife. On cross-examination, she testified that defendant was wearing jeans and a navy jacket and a beige windbreaker over it, was about 5'9", medium build, with no unusual facial characteristics. He had no hat; she thought he had gloves as he approached her, but in the car he didn't have gloves on. She didn't notice any gold fillings in his two front teeth. She looked at some student photographs at the Evanston Police Station and indicated several photographs familiar in nature to what the defendant looked like, but did not make a positive identification. However, she positively identified him in court, testifying: "There is no doubt that this is the man who attacked me." On further examination she repeated the identification.

It was stipulated that the defendant was 19 years of age.

Defendant testified: On January 16, 1972, he arrived at the Davis Street station in Evanston around 10:05. Three blocks from the station is the Dominick's Food Store where he worked. He was due to start work at 11:00 in the morning and finish at 5:00, but that day he arrived at the store at 10 or 15 minutes after 10:00. He was wearing a blue ski jacket, blue slack pants, a white shirt and a ski hat on his head. He also wore gloves and had a lunch bag in his hand. He never saw Mrs. Felt before the day he was arrested. He is originally from Haiti, speaks French fluently and has a French accent. He has a scar on his nose that he has had since he was seven years old.

In finding the defendant guilty, the court remarked that although he was only 18 at the time the offense was committed, he could very well be mistaken for someone who was 25 years of age; that defendant does have two teeth that are capped on the bottom in gold, but they are not completely gold and are not visible unless defendant opens his mouth fully; and that although the accent is "a Haitish accent," it might very well be characterized as British.

The identification here was very positive. The lighting conditions were bright and the witness had five minutes to observe defendant. She immediately recognized him when she saw him in the store a week later and she also recognized his voice after he spoke. Her testimony was essentially unimpeached. The testimony of a single eyewitness, if positive and credible, is sufficient to convict. People v. Brinkley, 33 Ill.2d 403, 211 N.E.2d 730.

The trial judge indicated that defendant could be mistaken for an older person (which would explain her description of him as older). The trial judge also remarked that the gold fillings were not so obvious, and therefore would not necessarily have been included in a description of him. The judge also stated that

while defendant's accent was "Haitian," it could be mistaken for a "British" accent. Moreover, there was evidence which, if believed, showed that the defendant attempted to flee when he realized that the complainant was identifying him to the police officers.

The judgment of the circuit court is affirmed.

A F F I R M E D.

LORENZ and SULLIVAN, JJ., concur.

(Publish abstract only.)

59237



15 I.A.³ 773

PEOPLE OF THE STATE OF ILLINOIS,)	
	)	APPEAL FROM THE
Respondent-Appellee,	)	CIRCUIT COURT OF
	)	COOK COUNTY.
vs.)	
)	
CLIFTON FERGUSON,	)	HONORABLE
	)	ARTHUR DUNNE,
Petitioner-Appellant.	)	PRESIDING.

*

PER CURIAM (FIRST DISTRICT, FIFTH DIVISION):

This appeal is from an order denying a post-conviction petition.

Clifton Ferguson, petitioner, had been charged by indictment with the crime of rape, in violation of section 11-1 of the Criminal Code (Ill.Rev.Stat. 1971, ch. 38, par. 11-1). On September 22, 1972, he had entered a plea of guilty and was sentenced to a term of four years to four years and one day. Petitioner did not appeal that conviction.

On November 22, 1972, petitioner filed the instant post-conviction petition alleging that he was denied effective assistance of counsel because his attorney represented both himself and a co-defendant, and that his plea of guilty was involuntary in that it was the result of coercion by the Assistant State's Attorney. On April 2, 1973, an evidentiary hearing was held. Anthony Montemurro testified that he was the Assistant State's Attorney in charge of petitioner's case; that petitioner's counsel asked him to have a conversation with petitioner and some members of his family; that at that time the witness indicated that after a trial he would recommend a sentence of five to fifteen years in the light of the facts in the case. He further testified that he then agreed with

* JUSTICE DRUCKER did not participate.

100-10000



the defense attorney that if defendant were to enter a plea of guilty, he would recommend a sentence of four years (the statutory minimum) to four years and one day. Subsequently, defendant entered a plea of guilty and the witness did, in fact, recommend a sentence of four years to four years and one day, which was accepted and imposed by the trial judge. After the hearing, petitioner's post-conviction petition was denied.

The Public Defender of Cook County was appointed to represent petitioner on appeal. He has now filed a motion for leave to withdraw accompanied by a brief in support thereof pursuant to Anders v. California, 386 U.S. 738. Copies of the motion and brief were mailed to the petitioner on September 11, 1973. He was informed that he had until November 16, 1973, to file any additional points he might choose in support of his appeal. Petitioner has responded by filing a two-page document entitled "Points in Support of Appeal."

The Public Defender's motion to withdraw states that after reviewing the entire record, it was his belief that the only possible basis for an appeal would be whether, after hearing, the two points raised in the post-conviction petition, as set forth above, had been properly denied.

As to the point that representation of both defendants in this cause by the same attorney denied him effective assistance of counsel, unless there is a showing that a defendant was prejudiced by such dual representation, or that a different result might have been obtained had separate counsel been appointed, a court of review will not disturb the judgment on the basis of conjectural or speculative conflicts between the interests of co-defendants which are envisioned for the first time on appeal. People v. McCasle, 35 Ill.2d 552, 221 N.E.2d 227; People v. Somerville, 42 Ill.2d 1, 245 N.E.2d 461. In the case at

bar, petitioner did not allege how he was prejudiced by joint representation of both himself and a co-defendant. Indeed, it would be hard to envision how such prejudice could have existed since petitioner's co-defendant failed to appear (his bond was forfeited), and petitioner pleaded guilty before trial.

Petitioner's second point was that his plea of guilty was involuntary as it was the result of coercion by the Assistant State's Attorney. In his affidavit, petitioner alleged that the Assistant State's Attorney threatened him with 15 years in prison if he was found guilty after a trial. The testimony of the Assistant State's Attorney at the hearing on the post-conviction petition established that he had talked with petitioner at the latter's request. He stated that after a trial, he would recommend a sentence of five to fifteen years, but if defendant were willing to enter a plea of guilty, he would recommend the minimum sentence of four years to four years and one day. The fact that defendant feared he would receive a more severe sentence after a trial does not establish that his plea of guilty was involuntary. People v. Stephenson, 42 Ill.2d 185, 246 N.E.2d 268. Prior to his plea of guilty, petitioner was fully admonished as to the consequences of his plea. We find that petitioner was not deprived of any constitutional right by any improper conduct on the part of the prosecution.

In his reply to this court, petitioner argues that the evidence of his guilt was not overwhelming for the irrelevant reason that, according to him, his brother (the missing co-defendant) had been "the main perpetrator" of the crime. Petitioner also cites from the trial record and argues that certain dates in the Public Defender's brief are in error. Petitioner's argument, even if accepted, does not establish a right to post-conviction relief. A plea of guilty voluntarily entered precludes the necessity of proof. People v. Love, 6 Ill.App.3d 577,

286 N.E.2d 355. Further, our review of the record indicates that the facts stipulated to at the time the court accepted the plea of guilty, clearly established that there was a factual basis for the plea.

After a full examination of all the proceedings in accordance with the dictates of Anders, we concur in the opinion of the Public Defender that points thus raised are not arguable on their merits and an appeal is wholly frivolous. Nor have we been able to discover any additional possible grounds for an appeal which are not also frivolous.

Therefore, the Public Defender is granted leave to withdraw as counsel for petitioner on appeal and the trial court's order denying the post-conviction petition is affirmed.

MOTION ALLOWED.
JUDGMENT AFFIRMED.

(Publish abstract only.)

11-8-10

5th, 11th

12 April

15 I.A.³ 814

72-359

UNITED STATES OF AMERICA

State of Illinois)
Appellate Court) ss.
Second District)

At a session of the Appellate Court, begun and held
at Elgin, on the 3rd day of December, in the year of our
Lord one thousand nine hundred and seventy-three, within and
for the Second District of Illinois:

Present -- Honorable THOMAS J. MORAN, Presiding Justice
 Honorable GLENN K. SEIDENFELD, Justice
 Honorable WILLIAM L. GUILD, Justice
 LOREN J. STROTZ , Clerk
 JOSEPH C. DORING, Sheriff

BE IT REMEMBERED, that afterwards, to wit: On
December 10, 1973 the Opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, viz:

11-2-15

Feb. Rev

NO. 72-359

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

LOUIS J. GARDNER, Clerk
Appellate Court, 2nd District

THE PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Plaintiff,	)	Appeal from the 18th
	)	Judicial Circuit
v.)	
	)	Hon. L. L. Rechenmacher
RAMON M. RODRIQUEZ AND ROBERTO	)	Judge presiding
MEDINA,)	
)	
Defendants.)	

MR. PRESIDING JUSTICE WILLIAM L. GUILD delivered the opinion of the court:

This is an appeal by the State of Illinois from an order of the trial court suppressing the evidence.

The defendants herein have failed to file a brief or other pleading in support of their position which leaves the decision of whether to reverse pro forma or to consider the appeal on its merits to the sound discretion of the reviewing court. (See People v. Marro (1972), 4 Ill. App. 3d 197, 280 N.E.2d 560, and cases cited therein.) We believe the issue herein presented is of sufficient importance to consider the case on the merits.

At the hearing on defendant's motion to suppress, evidence was presented that on the evening of June 2nd, 1972, the two defendants herein were parked in a no parking zone in the Oakbrook Shopping Center. The Oakbrook police asked the defendants to move their car which they did. The police became suspicious and placed the car under surveillance. Shortly thereafter, a woman went to the car carrying a Sears shopping bag which she placed in the rear of the car and then returned to the shopping mall. Defendant Medina then left the vehicle and also went into the mall. A few

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moments later Rodriquez alone drove the car out of the parking area onto the highway where he was stopped by the police for having loud mufflers.

Officer Mandel testified that from outside the car he saw, in full view on the floor in the rear of the car, a Sears shopping bag full of clothing, on top of which was what looked like rolled up slacks. The officer testified as follows:

"A I asked Rodriquez, the driver, where he got that, and his reply was that they stole it.

Q What did he say and what did you say, specifically, if you recall?

A I asked him where he got the shopping bag and he says they stole it.

Q He said he stole it?

A They stole it.

Q What is the next thing that you said and what is the next thing that he said?

A I asked him where, where they stole it, and he says various stores, or different stores."

A second officer came upon the scene who testified in part as follows:

"A He (Officer Mandel) informed me that the subject did not have a driver's license and showed me the shopping bags in the rear of the vehicle and said that the subject said that they stole them."

The defendant was then placed under arrest.

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The trial judge stated that the police officer was watching the car, became suspicious, and had a very good reason to be suspicious. The judge went on to state that "suspicion isn't a reason to search a car and I don't believe that this was a good search." However, the court further stated "granted that there was a violation . . . granted that the man did not have a driver's license, but the only reason to stop was apparently the suspicion of theft. I am going to suppress this evidence." The court thereupon entered the order suppressing the evidence.

Additionally, counsel for defendant Rodriquez, made the following statement: "They made the arrest, they made the stop for traffic purposes. At that time it would seem they had a right to make an arrest, or make a stop for traffic purposes. At this time the police officer had no grounds to believe that the parties had committed theft. At least, I don't believe they did."

There appears to be considerable confusion with regard to the difference between a "search" and discovery of an item by "plain view" or mere observation.

In the case before us there was no search. The officer observed the items in plain view. The exterior of a motor vehicle and the open area of the interior are within the plain view of the casual or purposeful onlooker and the 4th Amendment of the United States Constitution does not apply to such an observation.

In Harris v. United States (1968), 390 U.S.234, 88 S. Ct. 992, 19 L. Ed 2d 1067 at 1069, the Supreme court stated:

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"* * * It has long been settled that objects falling in the plain view of an officer who has a right to be in the position to have that view are subject to seizure and may be introduced in evidence."

See People v. Wright (1968), 41 Ill. 2d 170, 242 N.E.2d 180; Davis v. United States (1964), 327 F. 2d 301, 305; People v. Edmonds (1969), 109 Ill. App.2d 337, 248 N.E.2d 684 (Abst); People v. Pickett (1968), 39 Ill. 2d 88, 233 N.E.2d 560; People v. Belousek (1969), 110 Ill. App. 2d 442, 249 N.E.2d 693, 697; People v. Ellis (1969), 113 Ill. App. 2d 155, 251 N.E.2d 767; and People v. Davis (1965), 33 Ill. 2d 134 at 138, 210 N.E.2d 530.

It is true that the ordinary non-contraband article or articles in plain view are not subject to seizure after a valid traffic arrest. In People v. Eastin (1972), 8 Ill. App. 3d 512, 289 N.E.2d 673, the court stated, in discussing Coolidge v. New Hampshire (1971), 403 US 443, 91 S. Ct. 2022, 29 L. Ed 2d 564, that "plain view itself is never, standing alone, enough to justify a warrantless seizure. The articles were not contraband nor instrumentalities of crime. The plain view doctrine only applies when the evidence seized is incident to the arrest, or is contraband and a seizure incident to arrest must be justified by the circumstances, such as dangers of destruction, or harm to the officers or the items being known contraband, and the officers are lawfully on the premises." The question then arises as to when a non-contraband article, observed in plain view may be seized by the arresting officer in a traffic violation.

The trial court held herein that "suspicion isn't a reason to search a car, and I dont believe that this was

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a good search." Inasmuch as we have held that the facts here do not constitute a search, the question remains as to whether the "suspicion" of the officer that the items had been shoplifted, warranted a seizure of the same after observing them in "plain view." Obviously, if they had not been seized at that time, they would have been disposed of by the defendant. The officer testified that he asked the defendant where the slacks in the shopping bag came from. The defendant replied "they stole them." In addition to this, the police officers had seen a woman place the bag in the car in question.

The officer testified that the shopping bag was unusual as the clothing was rolled up right up to the top and that through his experience in dealing with shoplifters that they roll up the clothing. Further, upon the acknowledged valid traffic arrest, it was discovered that the car did not belong to the driver thereof and that he had no driver's license.

Considering all of these facts we find that there was no search involved herein and that the seizure of the stolen items by the officer was justified. The order of the trial court suppressing the evidence is reversed.

REVERSED and REMANDED.

SEIDENFELD and MORAN, Concur.

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15 I.A.³ 821

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PEOPLE OF THE STATE OF ILLINOIS,)	APPEAL FROM THE
)	CIRCUIT COURT OF
Plaintiff-Appellee,)	COOK COUNTY.
)	
v.)	
	)	HONORABLE
ROBERT E. DANIELS,	)	KENNETH R. WENDT,
	)	PRESIDING.
Defendant-Appellant.)	

Mr. JUSTICE HALLETT delivered the opinion of the court:

The defendant was convicted of the crime of rape and sentenced to from four to twelve years in the Illinois State Penitentiary. No questions are raised with respect to the sufficiency of the indictment. The facts which led up to the crime are not disputed, nor are any issues raised with respect to the sufficiency of the evidence. The three questions raised in the appeal before us are: 1) whether the defendant knowingly waived a jury trial; 2) whether a mandatory minimum sentence of four years in the penitentiary without the alternative of probation is excessive and contrary to the dictates of Article I, Section 11 of the Constitution of the State of Illinois; and 3) whether the provisions of the Juvenile Court Act, (Ill. Rev. Stat. 1967, ch. 37, par. 2), which allows males of 17 years of age or over to be tried as adults, violate the Equal Protection Clauses of the State and Federal Constitutions, as female offenders are treated as juveniles until their eighteenth birthday.

The defendant was convicted on March 13, 1972, of the crime of rape, after a bench trial. The main evidence of the case against him was the testimony of the prosecutrix, Gloria Baker. Because no questions are raised as to the sufficiency of the proof, we will not summarize the evidence but will turn immediately to the first issue raised by the defendant, that he did not knowingly and understandingly waive a trial by jury. We have examined the record and we find that after the defendant had been carefully questioned by the court and stated that he understood the significance of his

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waiver, he executed a jury waiver form. It is also clear that he had had ample opportunity to discuss his waiver with his counsel prior to the time of trial, and we can find no error in the procedure as followed in this case. As was said by our Supreme Court in People v. Steenbergen (1964), 31 Ill. 2d 615, 617, 203 N.E. 2d 404:

"Defendant first argues that he was denied his constitutional right to a trial by jury. The statute expressly provides that where defendant waives a jury the cause shall be heard and determined by the court without a jury, (Ill. Rev. Stat. 1961, chap. 38, par. 736, now chap. 38, par. 115-1,) and we have held that a defendant charged with a felony may waive a trial by jury. (People v. Fisher, 340 Ill. 250; People v. Bradley, 7 Ill.2d 619.) A jury trial is a right and a privilege and is not a jurisdictional requirement. The duty of the court is to determine whether defendant knowingly and understandingly waived this right. People v. Wesley, 30 Ill.2d 131; People v. Clark, 30 Ill.2d 216; People v. Surgeon, 15 Ill.2d 236."

This is precisely what the court has done in the case before us, when the trial judge questioned the defendant before having him execute the waiver form. From the record it is clear that the defendant understood what he was doing, and there are no grounds for reversal with respect to this issue.

We now turn to the second point raised by the defendant, that his sentence was excessive in that it violated the standards set forth under Section 11, Article I of the Illinois State Constitution, which reads in part:

"All penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship."

This issue was recently raised and decided in People v. Jones (1971), 2 Ill. App. 3d, 636, 638-639, 276 N.E. 2d 759, where the court said:

"The defendant argues that under the Model Penal Code and the Model Sentencing Act the offense of rape is a second degree felony and should carry a maximum sentence of ten years and that the minimum sentence should not exceed one-third of the maximum sentence imposed. While

we have no argument with this proposition, neither the Model Penal Code nor the Model Sentencing Act have been adopted by the legislature, nor has the Supreme Court of the State of Illinois used either of the vehicles as a standard to be used in criminal cases. Rape is a heinous crime and the legislature saw fit to set the punishment to be meted out to offenders and so long as the court stays within the limits prescribed by the act, the Appellate Court cannot arbitrarily change the punishment."***

Since the legislature determined that the crime of rape was sufficiently serious to warrant imprisonment without the immediate alternative of probation, we cannot say that the sentence was excessive. The legislature was mindful of the Constitution when the new code was enacted, and we do not see how the lack of opportunity for probation violates the spirit of Section 11. And as the sentence imposed is very near the statutory minimum, we do not see that the trial judge abused his discretion when he imposed it. Therefore this contention must also fail.

We now consider the third issue raised by the defendant—that the provisions of the Juvenile Court Act, which differentiate between male and female, violate the Equal Protection Clauses of both the State and Federal Constitutions. Since the time of the defendant's trial, the State Legislature has enacted P.A. 77-2096, (effective January 1, 1973), which abolished this distinction, and now defines a minor as anyone under the age of seventeen years. Also subsequent to the filing of this appeal, our Supreme Court considered this problem in the case of People v. McCalvin, et al., No. 44839, October Term, 1973, and concluded that the same statute here challenged did not violate the Equal Protection Clauses of the State and Federal Constitutions. Speaking for the court, Mr. Justice Schaefer stated:

"By the statute in effect at the time of these offenses, the legislature had given the State's Attorney the duty to decide, in the first instance, whether or not a minor believed to be guilty of a violation of the law was to be prosecuted criminally. His decision was final unless, in the case of boys under 17 and girls under 18, the juvenile court judge objected to a criminal prosecution. In the event of such an objection 'the matter shall be

referred to the chief judge of the circuit for decision and disposition.' These administrative and judicial decisions were not made upon the basis of age and sex alone. Many other factors were taken into account, such as the nature of the offense charged, the previous behavior of the minor, the possibilities of rehabilitation and, in general, the best interests of the minor and the safety of the public. Those considerations, always implicit in the statute, have now been made explicit. (See, Ill. Rev. Stat., 1972 Supp., ch. 37, par. 702-7.) We do not have in this statutory scheme, therefore, a discrimination based upon sex alone, as was the case in Reed v. Reed (1971), 404 U.S. 71, 30 L.Ed. 2d 225, 92 S. Ct. 251, and Frontiero v. Richardson (1973), 411 U.S. 677, 36 L.Ed. 2d 583, 93 S. Ct. 1764.

"The line that the statute formerly drew between those minors who were to be prosecuted criminally and those who might be retained within the jurisdiction of the juvenile court cannot, in our opinion, be fairly described as a 'suspect classification.' No evidence was introduced by either defense or prosecution in opposition to or in support of the statutory classification. In the present case it cannot be supposed that any State's Attorney, confronted with similar crimes of violence allegedly committed by 17-year-old girls, would have failed to decide to prosecute criminally, or that any judge would have interfered with that decision. We therefore hold that section 2-7 of the Juvenile Court Act did not violate the equal-protection clause. We adhere to the conclusion we reached in People v. Pardo (1970), 47 Ill.2d 420, appeal dismissed for want of a substantial Federal question, Pardo v. Illinois (1971), 402 U.S. 992, 29 L.Ed. 2d 158, 91 S. Ct. 2179."

The above opinion of the Supreme Court is determinative of this issue. The judgment is therefore affirmed in all respects.

Judgment affirmed.

Goldberg and Egan, JJ., concur.

Abstract only.

15 I.A.³ 828

APPEAL FROM
CIRCUIT COURT
COOK COUNTY

VS.

HONORABLE
PAUL A. EPTON,
Presiding.

Defendant-Appellant.

CHICAGO BAR
ABST.
ASSOCIATION

Walter Biles was charged by indictment with the crime of murder in violation of section 9-1 of the Criminal Code [Ill. Rev. Stat. 1969, ch. 38, par. 9-1]. After a jury trial he was found guilty and sentenced to a term of 15 to 40 years. On appeal, defendant argues that he was prejudiced by comments made by the trial judge during the testimony of Dr. Jerry Kearns, the coroner's pathologist.

Bessie Mae Miller testified that on November 19, 1970, she was in the apartment of John Hill with the defendant. She was drinking and became intoxicated. While in Hill's apartment, she observed defendant with a gun in his hand.

After leaving the apartment she "passed out." When she "came to," she was on the second floor of the building and was holding the head of her son, Robert Lee Miller, in her lap.

Chicago Police Officers Thompson and Glover testified that on November 19, 1970, at approximately 9:30 P.M., they proceeded to 1425 East Marquette Road, Chicago. On the second floor of that building they saw the body of Robert Lee Miller lying in the hallway. They observed a small hole in his back with blood stains around it. There was no weapon on his person.

Chicago Police Investigators Harold Huffman and Patrick O'Hara testified that they were assigned the investigation of the homicide of Robert Lee Miller. Pursuant to their investigation, they attempted to locate the defendant. Their efforts disclosed that he had not reported for work after November 19, 1970. On November 29, 1970, defendant surrendered to the Joliet Police Department.

Brenda Miller testified that she was the wife of Robert Lee Miller. On November 19, 1970, at approximately 9:30 P.M., she and her husband were in their apartment on the second floor at 1425 East Marquette Road when the doorbell rang. When they opened the door they saw Robert Miller's mother, Bessie Mae Miller, and the defendant. Bessie Mae Miller appeared to be intoxicated and fell down the stairs. Robert Miller picked her up and carried her upstairs. Brenda

Miller heard the door click, turned around and saw defendant with a gun in his hand. Defendant then shot Robert Miller. Robert Miller fell to the floor and defendant shot two more times. Defendant then ran out of the apartment and down to the first floor. Brenda Miller was approximately 10 feet from the defendant at the time she observed him shoot her husband. The next time she saw her husband he was dead.

James Biggers, a Chicago Police Mobile Unit technician, testified that on November 19, 1970, he proceeded to the second floor of 1425 East Marquette Road. He identified certain photographs he had taken of the scene and of the wound in the victim's back.

Dr. Jerry Kearns testified that he is a pathologist for the coroner of Cook County. He performed an autopsy on the body of Robert Lee Miller. An examination revealed a bullet wound in Miller's back on the left side below the lower margin of the shoulder blade. The bullet entered the chest, lacerating a lung and both sides of the heart. Dr. Kearns testified that in his opinion, the cause of death was a bullet wound of the chest and heart. Dr. Kearns also testified that in his opinion, a man receiving the type of injury Robert Miller did could not have moved more than a few steps after being shot.

John Hill testified for the defense that he is the grandfather of the deceased. He testified that the deceased had stolen money and a radio from him.

Walter Biles, defendant, testified that on November 19, 1970, he was visiting John Hill at 1425 East Marquette Road,

Chicago. As he left Hill's apartment on the first floor he was struck from behind. He turned around and fired his gun twice. He then ran to avoid a robbery. He threw the gun into a garbage can after the shooting. He denied that he was ever on the second floor of the building. He testified that after the incident he did not return to his job but went to Joliet, Illinois.

Defendant's only argument on appeal is that certain comments made by the trial judge concerning the State's expert witness, Dr. Jerry Kearns, were prejudicial to the defendant. Defendant contends that when Dr. Kearns was called to testify the trial judge made three prejudicial comments. When Dr. Kearns was initially called to testify the trial judge made the following comment:

"Dr. Kearns, Mr. O'Gara is going to ask you some questions. Please be seated. The doctor doesn't need the microphone. He hasn't used it in forty years. Let's go."

We find nothing improper about this comment by the trial judge. He did nothing more than inform the bailiff that Dr. Kearns did not need a microphone. This comment was not improper and did not convey an improper impression to the jury.

The second comment by the trial judge that defendant alleges prejudiced him occurred when the Assistant State's Attorney started to qualify Dr. Kearns as an expert. The following then occurred:

"MR. BARTON (defense counsel): I will stipulate to the qualifications of the doctor."

THE COURT: That will save a half hour. Thank you very much, Mr. Barton.

MR. O'GARA (Assistant State's Attorney): Doctor, will you tell the court and jury how long you have been employed and occupied as pathologist for the Cook County Morgue?

MR. BARTON: We have stipulated to qualifications.

THE COURT: Well, the jury should know that Dr. Kearns has been working before all of us—before all of us were born, I think. Well, not quite, but go ahead. How long have you been working, doctor?

THE WITNESS: Since 1928."

Defense counsel offered to stipulate to the qualifications of Dr. Kearns. The State is not obliged to rely upon a defendant's stipulation and has a right to prove every element of the crime charged. People v. Botulinski, 392 Ill. 212, 64 N. E. 2d 486. When the Assistant State's Attorney attempted to ask Dr. Kearns how long he had been employed as a pathologist, defense counsel objected, stating that he had stipulated to the doctor's qualifications. The trial judge then stated that the jury should know Dr. Kearns had been a doctor before most of us were born. Dr. Kearns then answered the question by saying he had been employed as a doctor since 1928. The judge's comment, when viewed in context with the doctor's answers that he had been practicing for over 43 years, did not prejudice the defendant.

The third alleged prejudicial comment by the trial judge occurred when the Assistant State's Attorney asked Dr. Kearns a hypothetical question whether or not a man injured in the manner in which the deceased was injured could walk up

a flight of stairs. Defense counsel objected and the trial court overruled the objection. The following then occurred:

"MR. BARTON: The doctor wasn't there.

THE COURT: You were right, he wasn't there. Based upon his experience he has a right to give us the benefit of his opinion."

Defense counsel now argues that when the trial judge stated that Dr. Kearns had a right to give them the benefit of his opinion, this comment—especially when taken in conjunction with the trial judge's two earlier comments—suggested a strong regard for the integrity and credibility of Dr. Kearns, and invaded the province of the jury by suggesting the weight to be afforded his testimony. While the term "benefit" may have been a poor choice of words, when viewed in context of the entire trial, we do not believe that the defendant was prejudiced. The evidence of defendant's guilt was overwhelming. Even if considered error, the judge's comment was harmless.

For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed.

Judgment affirmed.

* GOLDBERG, J., did not participate.

15 I.A.³ 861



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PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Plaintiff-Appellee,)	APPEAL FROM
)	
v.)	CIRCUIT COURT,
)	
	)	COOK COUNTY.
)	
DeELVIN CHATMON,	)	Honorable Frank Petrone,
	)	Presiding.
Defendant-Appellant.)	

MR. JUSTICE DIERINGER delivered the opinion of the court:

At a bench trial in the Circuit Court of Cook County, the defendant, DeElvin Chatmon, was found guilty of criminal trespass to a vehicle and was sentenced to one year in the House of Correction.

The issues on appeal are whether the defendant was proven guilty beyond a reasonable doubt, and whether his conviction was based on an illegal arrest.

At about 3:00 A.M. on the morning of March 11, 1971, the car in which the defendant was a passenger was stopped by police in the city of Chicago for failure to display a city sticker. The officer who stopped the car stated he saw no sticker displayed on the right side of the windshield but subsequently discovered a suburban sticker displayed on the left side of the windshield. The driver of the car was unable to produce a driver's license, and the defendant offered to post his own Colorado license, stating the car belonged to his sister and he had allowed his companion to drive. This offer was refused by the police officer. When the driver was taken to the station, Chatmon was requested to go along, which he did voluntarily. At the station Chatmon again offered to post his license and once again was refused.

The arresting officer said Chatmon stated his sister lived in Chicago, but the existence of the suburban sticker prompted a check which determined the car was stolen. It was then the defendant was arrested.

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At trial the defendant stated that on the night of March 10, 1971, he wanted to go to the airport to catch a 2:00 A.M. flight to Denver. He intended to take a cab, but his companions came along in the car and offered to give him a ride. He denied telling the officer the car belonged to his sister.

The defendant first argues he was not proven guilty beyond a reasonable doubt because he was not proven to have knowledge that the car was stolen.

Although the defendant denies knowing the car was stolen, guilty knowledge may be proved by circumstantial evidence. People v. Grodkiewicz, (1959) 16 Ill.2d 192. The arresting officer stated Chatmon told him the car belonged to his sister who lived in Chicago, but the car was found to have a suburban sticker on the left side of the windshield, and he said nothing about being on his way to catch a plane. Even at trial Chatmon did not explain why he was picked up at 3:00 A.M. while allegedly trying to catch a 2:00 A.M. flight. The act of offering to post his own driver's license in lieu of that of the driver of the car may also be interpreted as an attempt to block investigation of the ownership of the vehicle.

Chatmon denies telling the officer the car belonged to his sister, but in a non-jury trial it is the duty of the trial judge to determine the credibility of the witnesses, and his finding will not be disturbed unless the evidence is so improbable or unsatisfactory as to leave a reasonable doubt of the defendant's guilt. People v. Vail, (1966) 74 Ill. App. 2d 308. After reading the record we hold the evidence adduced at trial was sufficient to find the defendant guilty beyond a reasonable doubt.

The defendant also claims his arrest was illegal because the car was stopped without probable cause. He argues the car was stopped for failure to display a city sticker, but a

suburban sticker was, in fact, exhibited. He contends the arrest of the driver of the vehicle was illegal and all the consequences of an illegal arrest are void.

This argument was not presented at trial, and for that reason we deem it to have been waived. However, the record is clear that the defendant went to the police station with his companion voluntarily, and he was not arrested until after it was known the car was stolen and probable cause for his arrest existed.

For these reasons the judgment of the Circuit Court of Cook County is affirmed.

AFFIRMED.

BURMAN, P.J., and ADESKO, J., concur.

Abstract only.



15 I.A.³ 874

No. 57999

CLARENCE LANDON, d/b/a UPSTAIRS LOUNGE,)	
	)	APPEAL FROM THE
	)	CIRCUIT COURT OF
Plaintiff-Appellant,	)	COOK COUNTY.
)	
vs.)	_____
)	
STATE OF ILLINOIS LIQUOR CONTROL COMMISSION,	)	HONORABLE
	)	EDWARD F. HEALY,
	)	PRESIDING.
Defendant-Appellee.)	

MR. JUSTICE McNAMARA delivered the opinion of the court:

Plaintiff brought this action in the circuit court of Cook County under the Administrative Review Act (Ill.Rev. Stat. 1961, ch.110, par.274 et seq.) seeking a review of an order by the State Liquor Control Commission revoking plaintiff's liquor license. The circuit court affirmed the decision of the Commission, and plaintiff appeals. Plaintiff contends that the order of the Commission is not supported by the evidence, and that the Commission's failure to serve its revocation order on him within five days after the hearing resulted in the Commission's loss of jurisdiction over the matter.

The Commission held the revocation hearing on December 11, 1970, rendered its decision on December 16, 1970, and served the order on plaintiff by mail on December 21, 1970. The Commission granted plaintiff's request to stay the enforcement of the order until he had exhausted his administrative appeal. The trial judge subsequently granted plaintiff's motion to delay implementation of the order until judicial review is completed.

The statutory provision (Ill.Rev.Stat. 1969, ch.43, par.137) giving rise to the complaint against plaintiff is as follows:

No person except a manufacturer or distributor, or importing distributor, shall fill or refill, in whole or in part, any original package of alcoholic liquor with the same or any other kind or quality of alcoholic liquor, and it shall be unlawful for any person to have in his possession for sale at retail, any bottles, casks, or other containers containing alcoholic liquor, except in original packages.

The statute (Ill.Rev.Stat. 1969, ch.43,par.95.06) defines the term original package as follows:

"Original package" means any bottle, flask, jug, can, cask, barrel, keg, hogshead or other receptacle or container, whatsoever, used, corked, or capped, sealed and labelled by the manufacturer of alcoholic liquor, to contain and to convey any alcoholic liquor.

At the hearing, the following stipulation between the parties was introduced into evidence:

"That on October 21, 1970, the Licensee, Clarence Landon, d/b/a Upstairs Lounge, 1544 South Kedzie Avenue, Chicago, Illinois, had for sale to customers in said license premises 28 bottles - 27 bottles of alcoholic liquor of the following brands; approximately one-third Seagram's V.O., approximately one-half of those 27 bottles being Seagram's V.O., the other half approximately one-half of the total being J.B. Scotch. These bottles were removed by agents of the Illinois Liquor Control Commission and upon analysis and examination by the chemist for the State of Illinois, if he were called to testify he would state that these bottles contained alcohol different than that indicated on the label.

In other words, the bottles, Seagram's V.O. did not contain Seagram's V.O. and different alcohol. And the bottles of J.B. Scotch did not contain J.B. Scotch and contained a different alcohol."

Except for an agent of the Commission who testified briefly concerning the appearance of the Lounge, the plaintiff was the sole witness at the hearing. Plaintiff testified that he was out of town at the time the Commission's agents discovered the contaminated liquor and that he had no knowledge as to who had tampered with the alcohol. He implied that his bartender, who suddenly and unexplainably quit after plaintiff had told him of the Commission's discovery, may have been the guilty party. Although the records were subpoenaed, plaintiff did not bring with him his invoices for all liquor purchased in the previous six months.

Plaintiff initially contends that the order of the Commission was not supported by the evidence. Plaintiff concedes that the Commission's agents found contaminated liquor on the premises. However, he points out that if the

unlawful mixture of alcohol had occurred prior to the liquor being sent from the manufacturer or distributor to him, then no violation of the statute could be attributed to him. Plaintiff proceeds to argue that, absent evidence before the Commission that the manufacturer or distributor had not tampered with the liquor, there was insufficient evidence to sustain the Commission's finding that he violated the statute.

Findings of an administrative agency must be sustained by the courts unless they are arbitrary and capricious or against the manifest weight of the evidence. (Dorfman v. Gerber (1963), 29 Ill.2d 191, 193 N.E.2d 770; Nechi v. Daley (1963), 40 Ill.App.2d 326, 188 N.E.2d 243.) Findings and conclusions of an administrative agency on questions of fact shall be held to be prima facie true and correct. Ill.Rev. Stat. 1961, ch.110, par.274 et seq. Also see Rock Isl. Fdy. v. City of Rock Island (1953), 414 Ill. 436, 111 N.E.2d 499.

We believe that the crux of the present violation of the Liquor Control Act is the possession for sale by a dram shop operator of illegally mixed alcohol. We hold that where, as here, open, unsealed bottles of name brand alcohol, also illegally containing non-brand name alcohol, are discovered on the shelf or behind the bar in the possession of a dram shop operator, an inference is created that the mixed alcohol was not in its original package, thus constituting prima facie evidence of a violation of paragraph 137 of the Liquor Control Act. The burden of going forward to rebut the inference created by the possession of the illegally mixed alcohol thereupon shifts to the dram shop operator without the necessity of the Commission hearing evidence from the manufacturer and distributor that the bottles were not contaminated at the time of leaving their possession and control. This holding does not compel the dram shop operator to "prove his innocence," nor does it shift the burden of proof; it merely shifts the burden of going forward to the

dram shop operator to rebut the inference.

In the present case, plaintiff introduced no evidence to rebut the inference that the liquor was illegally mixed after the seal of the original package had been broken. Indeed, he implied in his testimony that his former bartender had been the one who tampered with the liquor. However, the acts of an agent of a dram shop operator constituting a violation of a statutory provision are attributed to the operator (Linscomb v. Coppage (1963), 44 Ill.App.2d 430, 197 N.E.2d 48.) The findings of the Commission were supported by competent substantial evidence.

We find no merit in plaintiff's next contention that the Commission's failure to serve its revocation order on him within five days after the hearing resulted in the Commission's loss of jurisdiction in the matter. In so arguing, plaintiff attempts to apply the provisions of the statute contained in Ill.Rev.Stat. 1969, ch.43, par.149, to the present proceedings. That section requiring a local liquor control commissioner to give a five day notice to the licensee that his license has been revoked or suspended has no applicability to notice requirements for the Illinois State Liquor Commission. In the section of the statute (Ill.Rev.Stat. 1969, ch.43, par.154) prescribing notice to the parties from the State Commission, no time restrictions are imposed. In the instant case, the Commission gave plaintiff notice of the revocation order ten days after the hearing; that notice was timely and proper.

For the reasons stated, the judgment of the circuit court of Cook County is affirmed.

Judgment affirmed.

DEMPSEY, P.J., and MCGLOON, J., concur.



879

No. 55862

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM THE
	)	CIRCUIT COURT OF
Plaintiff-Appellee,	)	COOK COUNTY
)	
vs.)	_____
)	
DOUGLAS BROWN,	)	HONORABLE
	)	JAMES H. FELT
Defendant-Appellant.	)	PRESIDING

Mr. JUSTICE SULLIVAN delivered the opinion of the court:

After a bench trial, defendant was found guilty and sentenced to a term of 8 to 14 years for attempt rape, 8 to 14 years for deviate sexual assault and 20 to 40 years for armed robbery, the sentences to run concurrently. On appeal defendant contends: (1) he was not proven guilty beyond a reasonable doubt, (2) he was improperly sentenced for all three crimes since they all arose out of the same conduct, and (3) his sentence is excessive and should be reduced.

At trial, Carolyn Ann Asp, complaining witness, testified that she is a nun in the Society of the Sacred Heart. On May 23, 1970 at approximately 11:30 A.M., as she was returning to her home at 4940 S. Greenwood, Chicago, from a shopping trip, she heard footsteps behind her and, as she reached the porch of her home, she heard the footsteps break into a run. She turned around and observed a man approximately twenty feet away running toward her with a gun in his hand. When he reached her, he put the gun to her head, and told her not to scream or he would shoot her. He pushed her from the doorway to the porch and then onto a couch and told her if she made any noise he would kill her. He then ordered her to take off all of her clothing. She removed her skirt and he then told her to unzip his pants and take out his penis, while he kept the gun pointed at her head. She observed that he was wearing red underwear. He then told her to put his penis in her mouth and suck on it or he would kill her. She complied and he ejaculated in her mouth. During this time he kept the gun to her face or head and threatened to kill her if she made any sounds or did not

comply with his demands. He also demanded money and she gave him her wallet from which he took one five dollar bill and five one dollar bills. He then forced her to stand up and bend over the couch with her legs apart and he attempted to insert his penis into her vagina but was unable to achieve an erection. She was then told to kneel down on the floor and to put her head on the couch and, after telling her she would be shot if she got up or looked around, he left. She put her clothes on and went to the Mother Superior who immediately called the police. She described her attacker to a policeman, as being a medium height black man with a short natural, and wearing a gray pullover sweater with a white stripe design and dark gray pants. Approximately five minutes later the police arrived and Officer Byrd took her on a tour of the area. At 53rd and Woodlawn she observed defendant on the street and identified him as the man who had attacked her. Byrd called for help and he and Officer Grabowski placed defendant under arrest and brought him over to the squad car at which time she again identified him as her attacker. At this time defendant was wearing the same clothes worn at the time she was assaulted.

Sister Asp testified that during the incident the only time she observed defendant's face was for approximately ten seconds as he ran up to her on the porch. She also testified her attacker had clean shaven cheeks, but seemed to have a small growth of hair around his chin.

Myrten E. Byrd, a Chicago police officer, testified that on May 23, 1970, pursuant to a call, he proceeded to 4940 S. Greenwood and interviewed Sister Asp. He took her in the squad car on a tour of the immediate vicinity. At approximately 53rd and Woodlawn she saw and identified defendant as the man who assaulted her. At that point defendant entered Nickey's Restaurant. Officer Byrd called for assistance and then he and Officer Grabowski entered Nickey's Restaurant and placed defendant under arrest as he was

exiting from the men's room. A subsequent search of the men's room revealed a loaded .32 caliber revolver in the flush box of the toilet. A search of the defendant revealed one five dollar bill and five one dollar bills in defendant's right hand pocket and \$95 in defendant's left pocket. Defendant was wearing a pair of red undershorts.

Dennis Grabowski, a Chicago police officer, testified that he responded to Officer Byrd's call for assistance and that together they entered Nickey's Restaurant and he observed the defendant exiting from the men's room. Defendant was placed under arrest and when he searched the men's room, he found a loaded .32 caliber revolver in the flush box of the toilet.

Mary Godsey testified for the defense that she is the barmaid at the Mustang Lounge, 3737 S. State, Chicago. On May 23, 1970, at approximately 11:00 A.M., the defendant entered the lounge where he remained for approximately 15 to 20 minutes.

Ottie Morgan, the defendant's sister-in-law, testified that on May 23, 1970 the defendant came to her home located at 857 E. 80th Street at approximately 11:30 A.M. to return her husband's car. At approximately 11:55 A.M. she left her home to go to the laundromat and when she returned the defendant had left.

Carl Morgan, the defendant's brother, testified that on May 23, 1970, the defendant came to his house at approximately 11:20 A.M. to return his car. At approximately 12:20 he drove defendant to the shopping center at 53rd and Hyde Park, Chicago, and then returned home.

Defendant testified that on May 23, 1970 he had borrowed his brother's car and, at approximately 11:00 A.M., he was at 37th and State, first in the poolroom and then in the tavern. From there he drove to his brother's house and his brother then drove him to a shopping plaza at 53rd and Hyde Park. He was arrested a short time later as he came out of the men's room of Nickey's Restaurant. He denied that he attacked Sister Asp.

OPINION

I

Defendant first contends that he was not proven guilty beyond a reasonable doubt because his identification was vague, doubtful and uncertain.

He argues that the identification testimony was insufficient to support his conviction because: (1) the complaining witness testified that he had some hair about his chin and, when arrested, he did not have any hair about his chin; (2) the complaining witness did not notice any particular marks on his face although he had a scar under his left eye; (3) the complaining witness had only a short period of time within which to view him; and (4) his alibi defense created a reasonable doubt as to his guilt.

The question of an identifying witness' failure to notice or describe facial hair or a scar is not a prerequisite to identification, but only goes to the weight to be attached to the identification testimony. People v. Bennett, 9 Ill.App.3d 1021, 293 N.E.2d 687; People v. Robinson, 3 Ill.App.3d 843, 279 N.E.2d 526. Precise accuracy in describing a defendant's facial characteristics is unnecessary where the identification is positive. People v. Miller, 30 Ill.2d 110, 195 N.E.2d 694. Positive identification by a witness who has sufficient opportunity for observation may be enough to support a conviction. People v. Burts, 13 Ill.2d 36, 147 N.E.2d 281. Here, within an hour, Sister Asp identified the defendant a short distance from the scene of the offense while on a tour of the area with the police officer. Her testimony was positive and credible.

Defendant then argues that the complaining witness had but a limited period of time within which to view him. She testified that she was able to observe her assailant as he was running toward her for a period of approximately ten seconds. The credibility of witnesses, in a bench trial, is for the trier of fact whose finding will be disturbed only where the evidence is so unsatisfactory

that there is reasonable doubt as to defendant's guilt. People v. Hampton, 44 Ill.2d 41, 253 N.E.2d 385. This court has held that the viewing of a defendant for a period of time far less than that in the case at bar was sufficient to justify a conviction. People v. Wright, 10 Ill.App.3d 1035, 295 N.E.2d 510. The trial court here found that the complaining witness had a sufficient period of time to adequately identify the defendant. From our examination of the record, we do not believe that determination is erroneous. People v. Gaiter, 8 Ill.App.3d 784, 291 N.E.2d 172.

Defendant next says that a reasonable doubt of his guilt was raised by his alibi testimony that he was elsewhere at the time the crime was committed. The trial court, however, is not required to believe a defendant's alibi testimony. People v. Jackson, 54 Ill.2d 143, 295 N.E.2d 462; People v. Pierre, 114 Ill. App.2d 283, 252 N.E.2d 706. And, where the identification was positive and credible, it is sufficient to justify a conviction even though defendant asserts an alibi defense. People v. Bennett, 9 Ill.App.3d 1021, 293 N.E.2d 687. Here, the trial court found that defendant was the perpetrator of the crime charged and, from this record, we cannot say that the alibi testimony raised a reasonable doubt of his guilt.

II

Defendant next contends that because all the charges arose out of the same conduct and involved a single victim it was improper to impose more than one sentence. The rule is clear since People v. Schlenger, 13 Ill.2d 63, 147 N.E.2d 316, that, where offenses result from the same conduct, a defendant may not be sentenced on more than one offense. In People v. Moore, 51 Ill.2d 79, 281 N.E.2d 294, the defendant was convicted of rape, robbery, burglary, and deviate sexual assault and, on appeal, he argued that he was improperly sentenced on each of those offenses since they all arose out of the same conduct. Our Supreme Court rejected

this contention holding that, since the conduct which constituted each of the offenses was clearly divisible from the conduct which constituted each of the other offenses, defendant was properly sentenced on each. Here, the conduct involved in each of the offenses was clearly divisible and we conclude that defendant was properly sentenced for attempt rape, deviate sexual assault and armed robbery.

III

Defendant's final argument is that his sentences are excessive and should be reduced. While this court has authority to reduce a sentence, our Supreme Court has indicated this authority should be exercised with considerable caution and circumspection. People v. Taylor, 33 Ill.2d 417, 211 N.E.2d 673. The imposition of sentences is within the discretion of the trial court and, before we will interfere with such sentences, it must be manifest from the record that they are excessive and not justified. People v. Keene, 1 Ill. App.3d 720, 274 N.E.2d 130. Here, considering the nature of the offenses and the circumstances of their commission, we are of the opinion that the sentences imposed upon defendant for the offenses of deviate sexual assault and armed robbery (Class 1 felonies) are within statutory limits and, from our review of the record, we believe the trial court acted within his proper discretion in imposing them.

Although not argued by either side in their briefs, we have noted that defendant's sentence of 8 to 14 years on the charge of attempt rape does not comply with the Unified Code of Corrections which is applicable to cases pending on appeal after January 1, 1973 since those cases have not reached final adjudication. People v. Chupich, 53 Ill.2d 572, 295 N.E.2d 1. The Code provides that the penalty for attempt to commit a forcible felony of the type charged in the instant case shall not exceed the penalty for a Class 3 felony (Ill. Rev. Stat. 1972 Supp., ch. 38, par. 8-4(c)(3)), and it provides that for a Class 3 felony, "the maximum term shall be any

term in excess of one year not exceeding ten years" (Ill. Rev. Stat. 1972 Supp., ch. 38, par. 1005-8-1(b)(4)) and the minimum term "shall not be greater than one-third of the maximum term set in that case by the court" (Ill. Rev. Stat. 1972 Supp., ch. 38, par. 1005-8-1(c)(4)). Thus, on the charge of attempt rape, the maximum sentence of 14 years must be reduced to a term of 10 years, and the minimum sentence of 8 years must be reduced to a term of 3 years and 4 months.

For the reasons stated, we hold that the judgments of conviction and the sentences for the offenses of deviate sexual assault and armed robbery are affirmed and the judgment of conviction on the charge of attempt rape is also affirmed, but defendant's maximum sentence for that offense is reduced to a term of 10 years and the minimum sentence is reduced to a term of 3 years and 4 months, and, as modified, the sentence is affirmed.

Convictions affirmed,
sentences affirmed in part and, as modified,
affirmed in part.

DRUCKER, P.J., and ENGLISH, J., concur.

Publish abstract only.

1871



11-9

15 I.A.³ 902

No. 58696

PEOPLE OF THE STATE OF ILLINOIS,)	APPEAL FROM THE
Plaintiff-Appellee,)	CIRCUIT COURT OF
v.)	COOK COUNTY
HENRY BLOCKER,)	
Defendant-Appellant.)	HONORABLE
	THOMAS CAWLEY,
	PRESIDING.

PER CURIAM* (First District, Fifth Division):

Henry Blocker, defendant, was charged by complaint with theft in violation of section 16-1(a) (1) of the Criminal Code (Ill. Rev. Stat. 1971, ch. 38, par. 16-1(a) (1)). After a bench trial, defendant was found guilty and sentenced to a term of eight months in the House of Correction.

At trial, the following evidence was adduced: Rosa Rarios testified that on September 8, 1972, at 11:00 A.M. she was working at the candy store located at 2547 W. LeMoyne, Chicago, Illinois, when defendant entered the store, looked around for several minutes without purchasing anything and then left. At approximately 3:00 P.M. defendant again entered the store accompanied by a second man. While the second man held Mrs. Rarios at gunpoint, the defendant went behind the counter and took approximately \$65 from the cash register. The men also took Mrs. Rarios' wedding ring, watch and necklace. She observed them from a distance of about one and one half feet. The robbery took approximately two to three minutes. On September 14, 1972, the witness observed defendant pass by the front of her store. She called her husband who immediately called a police squad car that was passing by. The police then apprehended the defendant.

Defendant testified that on September 8, 1972, he was at the home of John Barnes, located at 1415 N. Western, Chicago, Illinois. He denied robbing or taking any property from Rosa Rarios.

*Mr. JUSTICE ENGLISH did not participate.

Johnny Ray Barnes testified that on September 8, 1972, defendant was at his home from the morning until approximately 6:30 P.M.

The Public Defender of Cook County who was appointed to represent defendant on appeal has now filed a motion in this court for leave to withdraw as appellate counsel. The motion, supported by a brief in support thereof pursuant to Anders v. California, 386 U.S. 738 states that the only possible arguments which could be raised on appeal are: whether the defendant's identification should have been suppressed; and whether defendant was proven guilty beyond a reasonable doubt. The brief concludes that an appeal on these issues would be without merit and wholly frivolous. Defendant was mailed copies of the motion and brief on August 16, 1973. He was informed that he had until October 11, 1973, to file any additional points he might choose in support of his appeal. He has not responded.

The first possible argument which could be made on appeal is that the identification testimony of the complainant should have been suppressed. The complaining witness testified that she viewed the defendant on the day of the robbery on two separate occasions. She further testified that several days later, she observed the defendant as he walked by her store and immediately recognized him as the robber. Her identification of defendant was in no way suggestive. Further, the record clearly reveals that she had a sufficient opportunity to observe the defendant to form an independent opinion for the in-court identification. People v. Drayton, 7 Ill. App. 3d 812, 288 N.E.2d 922.

The second possible argument which could be made on appeal is that defendant was not proven guilty beyond a reasonable doubt. In a bench trial, credibility of the witnesses is for the trial judge to determine and the trial court's finding will not be disturbed on appeal unless the evidence is so unsatisfactory as to leave a reasonable doubt as to defendant's guilt. (People v. Hampton, 44 Ill. 2d 41, 253 N.E.2d 385.) An identification by one eyewitness to a crime is sufficient to justify a conviction if positive and credible even though the defendant asserts an alibi defense. People v. Bennett, 9 Ill. App. 3d 1021, 293

N.E.2d 687.

In the case at bar, the testimony of Rose Rarios was positive, credible and sufficient to support defendant's conviction beyond a reasonable doubt. The trial court was not obliged to believe defendant's alibi testimony. People v. Jackson, 54 Ill. 2d 143, 295 N.E.2d 462.

After a full examination of all of the proceedings in accordance with the dictates of Anders, we concur in the opinion of the public defender that none of the points thus raised are arguable on their merits and that the appeal is wholly frivolous. Our examination of the record does not disclose any additional possible grounds for an appeal which are also not frivolous.

Therefore, the Public Defender is granted leave to withdraw as counsel for petitioner on appeal and the judgment is affirmed.

Motion allowed,
Judgment affirmed.

PUBLISH ABSTRACT ONLY.

15 I.A.³ 910



No. 58881

WAYNE JOHNSON,	)	APPEAL FROM THE
	)	CIRCUIT COURT OF
Plaintiff-Appellant,	)	COOK COUNTY.
)	
vs.)	
)	
PAPILLON, INC.,	)	HONORABLE
	)	LIONEL BERC,
Defendant-Appellee.	)	PRESIDING.

PER CURIAM:

Plaintiff, Wayne Johnson, obtained a default judgment under the Forcible Entry and Detainer Act against the defendant Papillon, Inc., on January 18, 1973, granting him possession of the premises at 5978 N. Lincoln Avenue, Chicago, Illinois. (Ill.Rev.Stat. 1971, ch.57, par.1, et seq.) This judgment was vacated on February 8, 1973, after a bench trial on February 16, 1973, the court found for the defendant on plaintiff's original complaint. Plaintiff now appeals from the judgment of February 16, 1973, and the order of February 8, 1973, contending that the default judgment of January 18, 1973, became final five days thereafter when defendant did not file a notice of appeal from that judgment as required by section 19 of the Forcible Entry and Detainer Act (Ill.Rev.Stat. 1971, ch.57, par.19); accordingly, plaintiff argues the default judgment of January 18, 1973 could, after the five-day period had passed, be attacked only collaterally, that is by a petition meeting the requirements of section 72 of the Civil Practice Act. Ill.Rev.Stat. 1971, ch.110, par.72.

Since resolution of the issue depends upon an understanding of the sequence of events in the court below, a chronological review of the essential points in the record is set out below:

January 3, 1973: Plaintiff, Wayne Johnson, filed his complaint alleging that the defendant was unlawfully withholding possession from him and that he was entitled to possession.

100.1.21

January 18, 1973: A default judgment against the defendant was entered and the writ of restitution was stayed five days. The common law record does not contain any documentation indicating that the defendant was given any notice of the suit. The record contains no report of the proceedings on January 18, 1973.

January 24, 1973: A writ of restitution and execution was issued and the Sheriff's return shows service by mail on this date.

February 1, 1973: Defendant's attorney served plaintiff with notice of motion by ordinary mail, of his intention to move to vacate the judgment of January 18, 1973, by appearing before Judge Berc on February 8, 1973.

February 8, 1973: Defendant moved to vacate the order of January 18, 1973, to stay all eviction proceedings and for leave to file an appearance and have the matter set for trial, which motion was granted and the trial was set for February 16, 1973. At the hearing on the motion to vacate, plaintiff's attorney argued: "No proceeding has been taken by the defendant except a notice of motion which was served by the defendant on February 1, 1973, which is beyond the statutory period." The judge pointed out: "This is an ex parte finding", and added: "I think I have the jurisdiction to set this judgment aside inasmuch as it was an ex parte judgment and give him a day in court." Later, when defense counsel asked plaintiff's counsel for a copy of the pleading, stating he did not have a copy of the complaint, plaintiff's attorney answered that a copy had been served on his client (i.e., the defendant), to which defendant's counsel answered: "That's the bone of contention."

February 16, 1973: Plaintiff filed a "motion to object to proceedings", which contended that the vacatur of the January 18,

1973, judgment on February 8, 1973, was void because the trial court lost jurisdiction five days after the entry of judgment on January 18, 1973. The motion stated in paragraph 1, "That the court acquired jurisdiction of the Defendant by personal service." The motion was denied and a trial was had on the merits. Plaintiff contended that defendant violated the lease which provided in paragraph 3 that the lessee would not "permit any alteration of or addition to any part of the Premises except by written consent of the Lessor." The testimony was conflicting and the trial court found for the defendant on the merits.

Defendant's motion of February 8, 1973, was brought under section 50(5) of the Civil Practice Act (Ill.Rev.Stat. 1971, ch. 110, par.50(5)) to vacate the default judgment of January 18, 1973. As such, it is distinguishable from the motion for a new trial that was at issue in Atlas Finishing Company v. Anderson (1949), 336 Ill.App. 167, 83 N.E.2d 177, on which plaintiff relies. Plaintiff's argument, that the five day appeal requirement of the Forcible Entry and Detainer Act, requires that a motion to vacate a judgment of default also be brought within five days of the entry of the judgment, has been answered in the negative in Sawyer v. Sholem (Third District: 1954), (Abstract), 2 Ill.App.2d 167, 118 N.E.2d 889, and Kjellberg v. Muno (1950), 340 Ill.App. 133, 91 N.E.2d 155.

Plaintiff strenuously argues that allowing a motion to vacate a default judgment to be filed more than five days after the judgment is rendered will violate the purpose of the Act to provide a summary remedy. However, where a motion under section 50(5) of the Civil Practice Act is concerned, the right of a speedy remedy must yield to other equities, such as the fundamental constitutional right to adequate notice. See, for example, Robinson v. Hanrahan (1972), 93 S.Ct. 30, reversing People ex rel. Hanrahan v. One 1965 Oldsmobile, et al (1972), 52 Ill.2d 37, 284 N.E.2d 646. The record in the case at bar does not show that notice of any kind was ever

served upon the defendant. The discussion on the motion to vacate on February 8, 1973, also supports the proposition that the motion was one to vacate the judgment because the defendant had received no notice of the proceedings. The test to be applied to a default judgment under section 50(5) of the Civil Practice Act is whether or not substantial justice is being done between the litigants and whether it is reasonable, under the circumstances, to compel the other party to go to trial on the merits. (People ex rel. Reid v. Adkins (1971), 48 Ill.2d 402, 406, 270 N.E.2d 841.) The following language from Rosewood Corp. v. Fisher (1970), 46 Ill.2d 249, 258, 263 N.E.2d 833 (holding certain equitable defenses "germaine" under section 5 of the Act), applies to the facts in the case at bar:

"A necessary concomitant of the seeking of relief through equity is a willingness to do equity. This is fundamental in equity jurisprudence. The invocation by defendants of equitable defenses necessarily requires that the trial court exercise its discretion by ordering such payments as the court deems proper and any other equitable arrangements protective of the property and the interests of all parties during the pendency of the litigation.

It does not escape us that the construction we have placed upon the act may interfere with the summary aspects of the remedy, when it is invoked against contract purchasers. But the right of such purchasers to be heard on relevant matters, and to be secure in their constitutional rights, as well as the desirable purpose of preventing a multiplicity of suits, is, and must be, superior to the desire to provide a speedy remedy for possession."

Therefore, defendant's motion to vacate the January 18, 1973 judgment filed 20 days after the entry of the default judgment, was timely filed within 30 days as required under section 50(5) of the Civil Practice Act. Since there is no report of the proceedings on January 18, 1973, nor any document in the common law record showing that the defendant was notified, and since it is a responsibility

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of the appellant to see that the record on appeal is complete, the reviewing court must presume that the evidence supported the action of the trial court and its order of February 8, 1973, which vacated the judgment of January 18, 1973. The judgment of the circuit court of Cook County entered on February 16, 1973, is, accordingly, affirmed.

Judgment affirmed.

Third Division. Mr. Justice Mejda did not participate.

15 I.A.³ 912

No. 58737

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM THE
	)	CIRCUIT COURT OF
Plaintiff-Appellee,	)	COOK COUNTY
	)	CHICAGO BAR
vs.	)	ABST.
	)	ASSOCIATION
FRANK W. MANN,	)	HONORABLE
	)	SIMON S. PORTER,
Defendant-Appellant.	)	PRESIDING.

MR. JUSTICE MCGLOON delivered the opinion of the court:

Defendant, Frank Mann, was charged with driving a motor vehicle under the influence of intoxicating liquor in violation of Ill.Rev.Stat. 1971, ch.95 1/2, par.11-501. At a bench trial in the circuit court of Cook County, he was found guilty as charged and fined \$100. He appeals.

Defendant's only contention is that the prosecution did not prove him guilty beyond a reasonable doubt and that the trial court erred in finding him guilty.

We affirm.

At trial, Sergeant James Riccio of the Village of Rosemont Police Department, testified that at approximately 11:00 p.m. on June 12, 1972, he observed the defendant in the driver's seat of an automobile pointed northbound on River Road at Devon Avenue in Cook County. The officer had responded to a motor vehicle accident call pertaining to that intersection. He testified that he smelled a strong odor of alcohol on defendant's breath. He further testified that defendant's attitude was talkative and carefree and that his speech was slurred, thick and confused. Defendant's clothes were orderly and he displayed no unusual actions.

The police officer transported defendant to the police station to investigate his condition. Certain performance tests were administered. Officer Riccio testified that on the balance test defendant was wobbly and swaying and on the turning test he was swaying. When requested to touch the index finger of each hand to his nose, defendant

was hesitant with his right hand and missed with his left hand. No coin test was given. When asked if he were under the influence of an alcoholic beverage, Officer Riccio testified that defendant replied: "I'm under the influence of whatever I am under the influence of."

Officer Riccio testified that he had been on the police force for four years and during that time had observed about 125 people under the influence of alcohol. Based on his observation of the defendant for one-and-one-half hours on the night of the occurrence and his experience as a police officer, it was his opinion that the defendant was under the influence of intoxicating liquor.

On cross-examination Officer Riccio testified that defendant was polite and adequately answered his questions. He further testified that defendant did not request a breathalyzer test and none was administered. He explained that he advised defendant of his constitutional rights when he was brought into the police station for investigation.

Defendant testified that he had no drinking habits and it was a rule of his church to abstain from alcohol. He claimed that he had not had a drink for two years prior to the night of the occurrence and that he had not had a drink since the incident. Defendant admitted having two brandies with his lunch and two beers during the six to eight o'clock cocktail hour on the day of the incident. He explained that he had these drinks in connection with his attendance at a seminar conducted at a nearby hotel. He testified that on his way home from the seminar at approximately 10:55 p.m., he approached a stoplight on River Road at Devon Avenue. Because he had been experiencing brake trouble, he applied his brakes gently and came to a stop in the middle of the intersection. Defendant stated that rather than proceeding

through the intersection, he exercised bad judgment, backed up, and hit another automobile. Defendant did not require any medical attention.

Defendant testified that after the police officer arrived at the scene, he had no trouble producing his license, getting out of his car, walking, or getting into the police car. Defendant remembered taking some performance tests at the police station. When asked about the test which required him to walk along a line on the floor, he responded that he did not recall seeing the line but walked what he considered to be an imaginary line. Officer Riccio had previously testified that a line of red tape had been placed on the floor of the police station. After the performance tests were completed, defendant was arrested. Defendant claimed that the police did not read his constitutional rights to him and that he requested a breathalyzer test but the police refused to administer the test. During cross-examination, defendant remembered saying to the police officer: "I'm under the influence of whatever I am under the influence of."

Defendant called his minister as a character witness. He testified that he was pastor of the church of which defendant was a member. He characterized defendant as one of the most outstanding men in the church. He testified that the defendant was concerned about the incident, bothered because he had broken a covenant with the church, and concerned about an adverse reaction from his co-workers. It was established that the witness did not see defendant on the day of the incident.

After receiving testimony and hearing arguments of counsel, the trial court found defendant guilty as charged and

fined him \$100. Defendant's post-trial motion was denied, and this appeal followed.

Defendant urges that his conviction be reversed on the basis of alleged contradictions between his testimony and that of the police officer. He also points out alleged inconsistencies in the police officer's testimony which he claims make the officer's credibility suspect. We have examined the record and find no merit in these arguments. Defendant questions the credibility of the police officer who was the only prosecution witness. Questions of credibility of witnesses are matters for the trier of fact, and his findings should not be disturbed unless the evidence is so improbable or unsatisfactory as to raise a reasonable doubt as to defendant's guilt. (People v. Raddle (1963), 39 Ill.App.2d 265, 188 N.E.2d 101.) In the instant case the evidence was sufficient to prove defendant guilty beyond a reasonable doubt. (People v. Greenberg (1967), 79 Ill.App.2d 288, 224 N.E.2d 577.) The trial court's finding rested on defendant's admissions, the opinion testimony of the police officer, based on his observation of the defendant and his experience observing people under the influence of intoxicating liquor, and the results of certain performance tests administered at the police station. The lack of scientific evidence in the form of breathalyzer test results is insufficient in itself to require reversal where other types of competent evidence establish defendant's guilt. People v. Bies (1971), 2 Ill.App.3d 1001, 276 N.E.2d 364.

For the above reasons, the judgment of the circuit court of Cook County is affirmed.

Judgment affirmed.

Mejda and McNamara, JJ., concur.

15 I.A.³ 924

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58647

PEOPLE OF THE STATE OF ILLINOIS,)
)
Plaintiff-Appellee,) APPEAL FROM THE CIRCUIT COURT
) OF COOK COUNTY.
vs.)
)
CLEO PRESTON,) HONORABLE MEYER H. GOLDSTEIN,
) Presiding.
Defendant-Appellant.)

ABST.

PER CURIAM:*

Cleo Preston, defendant, was found guilty after a bench trial of the offense of theft of property not exceeding \$150 in value, in violation of Section 16-1(a)(1) of the Criminal Code (Ill.Rev.Stat. 1971, ch. 38, par. 16-1(a)(1)). He was sentenced to one year in the House of Correction. On appeal, defendant argues that the State failed to prove beyond a reasonable doubt that the prosecuting witness was the owner of the stolen property.

At trial, the following evidence was adduced: Anna Howard testified that she lived above the Howard Clothing Store, located at 1504 S. Pulaski, which was owned by her husband and brother. At approximately 12:30 A.M. on March 21, 1971, the alarm went off in the store and Mrs. Howard immediately phoned the police. The police responded to the call and Mrs. Howard observed three boys running from the store. The police apprehended the three boys. The store was ransacked; merchandise was strewn all over the floor and the cash register drawer had been pried open. Taken from the store was \$25 from the cash register and several garments. She identified the defendant as one of the boys she had seen run from the store. She testified that she was the owner of most of the items recovered and specifically identified as belonging to her a jacket recovered by the police on the north side of the store building.

Pearl Howard testified that he is part owner of the Howard Clothing Store, located at 1504 S. Pulaski, Chicago, Illinois. On

March 21, 1971, at approximately 12:30 A.M., the alarm in the store went off. The police were immediately summoned. A bar had been removed from the window to gain entry into the store.

Frank Barnes, a Chicago Police officer, testified that on March 21, 1971, he responded to a call and proceeded to 1504 S. Pulaski, Chicago, Illinois. He observed the defendant and a second offender exiting through a side entry from 1504 S. Pulaski. Defendant then fled eastbound across Pulaski and then south toward 16th Street in the alley behind the east side of Pulaski. Officer Barnes and his partner gave pursuit and apprehended the defendant at approximately 1517 S. Pulaski in the rear of the alley. After being advised of his constitutional rights, the defendant admitted he had been in the store. Recovered was a wet-look jacket, subsequently identified by Anna Howard.

Cleo Preston, defendant, testified that on March 21, 1971, he was never inside the Howard Clothing Store and did not break into the store.

Defendant's only argument on appeal is that the State failed to prove beyond a reasonable doubt that the prosecuting witness was the owner of the stolen property. Defendant reasons that, while the complaint states that Anna Howard was the owner of the property in question, the testimony at trial of Anna Howard established that the items were taken from the Howard Clothing Store, which was owned by Mrs. Howard's husband and brother.

Ownership is an essential element of the offense of theft which must be alleged and proven. People v. Thomas, 9 Ill.App.3d 384, 292 N.E.2d 153; People v. Roach, 1 Ill.App.3d 876, 275 N.E.2d 309. In the case at bar, the complaint specifically alleged that the stolen property belonged to Anna Howard. At trial, Anna Howard testified that most of the stolen property belonged to her. She specifically identified the jacket recovered by the police as her property. Since defendant was not charged with burglary of the Howard Clothing Store or theft from the Howard Clothing Store, the ownership of that store

is irrelevant. The only relevant factor was the ownership of the stolen property. In a bench trial, it is the duty of the trial judge to determine the credibility of witnesses and the weight to be given to their testimony. Only where the evidence is so unsatisfactory as to raise a reasonable doubt of the defendant's guilt will the finding of the trial court be disturbed. People v. Hampton, 44 Ill.2d 41, 253 N.E.2d 385; People v. Pointer, 6 Ill.App.3d 113, 285 N.E.2d 171. Here, the uncontradicted testimony of Anna Howard established that she was the owner of the jacket and of most of the other clothing items recovered. The evidence adduced at trial was sufficient for the trial judge to determine that defendant was proven guilty beyond a reasonable doubt.

Since defendant's case has not yet reached the stage of final adjudication, the Unified Code of Corrections is applicable. People v. Harvey, 53 Ill.2d 585, 294 N.E.2d 269. Under the Unified Code of Corrections, theft of property of a value under \$150 is a Class A misdemeanor (Ill.Rev.Stat., 1972 Supp., ch. 38, par.16-1(e)(1)). The maximum penalty for Class A misdemeanor is a term of imprisonment "for any term less than one year" (Ill.Rev.Stat., 1972 Supp., ch. 38, par. 1005-8-3(a)(1)). In the case at bar, defendant's sentence of one year in the House of Correction is not a term for less than one year and must therefore be reduced. Defendant's sentence is reduced to a term of 364 days, and, as modified, the judgment of conviction is affirmed.

JUDGMENT AFFIRMED AS MODIFIED.

FIRST DISTRICT, SECOND DIVISION
*LEIGHTON, J., did not participate.

PUBLISH ABSTRACT ONLY.

19-2-1-1-2



August 8, 1973. He was informed that he had until October 24, 1973, to file any additional points he might choose in support of his appeal. He has not responded.

The petition and brief of the public defender allege that the only possible basis for an appeal would be whether defendant was entitled to an evidentiary hearing on the allegations in his amended post-conviction petition. Defendant's only allegation in his amended post-conviction petition was that his plea of guilty was secured in violation of his constitutional rights in that his court-appointed attorney was incompetent. Defendant bases this allegation on the fact that counsel failed to call any witnesses in defendant's behalf even though counsel was supplied the names of four witnesses by defendant. Defendant listed four potential witnesses in his petition but did not indicate what their testimony would be. We have carefully reviewed defendant's plea of guilty which was entered after a pre-trial conference with the court. Prior to accepting the plea of guilty, defendant was admonished in accordance with Supreme Court Rule 402 (Ill.Rev.Stat. 1971, ch. 110A, par. 402). Defendant was specifically admonished that upon his plea of guilty there would be no trial of any type and he would waive his right to be confronted by witnesses against him. Defendant specifically stated that he understood that upon his plea of guilty he would be sentenced to a term of 14 to 19 years. Defendant expressed no displeasure with his attorney at that time. Defendant's plea of guilty was voluntary and that plea therefore waives all errors non-jurisdictional in nature. People v. Phelps, 51 Ill.2d 35, 280 N.E.2d 203.

Even if defendant's argument were to be considered on its merits, it is without merit. In order to establish incompetency of counsel, defendant must establish actual incompetency of counsel as reflected in the manner of carrying out his duties and substantial prejudice resulting from such incompetency without which the

outcome probably would have been different. People v. Goerger, 52 Ill.2d 403, 288 N.E.2d 416; People v. Dudley, 46 Ill.2d 305, 263 N.E.2d 1. Here, defendant's only allegation as to incompetency of counsel was that counsel did not call any witnesses in defendant's behalf. A plea of guilty voluntarily entered precludes the necessity of proof. People v. Hart, 52 Ill.2d 235, 287 N.E.2d 697. Upon defendant's plea of guilty, it was unnecessary for witnesses to testify on either side. Defendant's amended post-conviction petition does not allege that counsel had failed to investigate the case or had failed to contact the witnesses stated in the petition. The allegations of defendant's amended post-conviction petition were insufficient to demonstrate incompetency of counsel and were insufficient to require an evidentiary hearing.

After a full examination of all the proceedings in accordance with the dictates of Anders, we concur in the opinion of the public defender that the point thus raised is not arguable on its merits and that an appeal is wholly frivolous. Our inspection of the record does not disclose any additional possible grounds for an appeal which are also not frivolous.

The public defender's motion to withdraw as counsel is allowed and the judgment of the circuit court of Cook County is affirmed.

MOTION ALLOWED;
JUDGMENT AFFIRMED.

* JUSTICE HALLETT took no part.



15 I.A.³ 963

58218

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM
	)	CIRCUIT COURT OF COOK COUNTY.
Plaintiff-Appellee,)	
)	
v.)	
)	
ELMER COLEY,	)	HONORABLE
	)	ROBERT J. COLLINS,
Defendant-Appellant.)	)	PRESIDING.

MR. PRESIDING JUSTICE DRUCKER delivered the opinion of the court:

In a single count indictment defendant was charged with the crime of robbery. Tried before a jury, he was found guilty as charged and sentenced to a term of not less than six nor more than 20 years. On appeal defendant contends: (1) he was not proven guilty beyond a reasonable doubt; (2) the prosecution's closing argument was improper; and (3) the sentence he received was excessive.

James Davis, the complaining witness, testified that on July 29, 1971, at approximately 3:00 A.M., he was robbed of his watch, ring, wallet and car keys by defendant and an accomplice. He had parked his 1968 Cadillac in the vicinity of 743 West 60th Street in Chicago and attempted to enter a nearby restaurant to purchase a package of cigarettes. He had walked about 25 feet from his car when he was accosted by two men. One of his assailants, whom he subsequently identified as defendant, approached him from his right side and attacked him with a wooden or metal instrument from a distance of two feet. Defendant hit Davis across the face with this instrument, demanding that he give up his watch and ring. Contemporaneously Davis could feel defendant's accomplice reach into his back pocket. After receiving approximately a half dozen blows, Davis fell to the ground and lost consciousness. During the attack his left eye was cut and his nose bloodied. Davis was able to observe defendant for about two minutes during the course of the robbery. He described

10.11.11



defendant as wearing a black fishnet shirt and a rag tied around his head. Davis regained consciousness at a hospital to which he had been removed. While hospitalized he was still dazed and could not remember having spoken with police officers. At 8:00 A.M. on July 29 he was released from the hospital. That evening he viewed a police lineup. At that time he identified defendant and another man as his attackers.

Officer Jeffery O'Bryan of the Chicago Police Department testified that at 11:00 A.M. on July 29 pursuant to a radio call he proceeded to a vacant lot in the vicinity of 627 West 60th. There he saw five black males removing the tires from a 1968 Cadillac. As he and his partner alighted from their squadrol, the five men ran away. The officers pursued the men, apprehending one of them. O'Bryan radioed a description of the clothing worn by those who had escaped. When he returned to his squadrol, O'Bryan received another radio message to the effect that the men whom he had seen stripping the Cadillac were presently getting into another car. O'Bryan drove to the location given in the message and with the aid of other officers was able to curb this second car. The occupants of this car, who fit the description of the men observed stripping the Cadillac, were placed under arrest. O'Bryan identified defendant as one of those whom he had arrested.

Roosevelt Harris testified that on July 29 he was working for a wrecking company in the area when shortly before noon he saw a Cadillac drive into a vacant lot at 627 West 60th Street. He testified that five or six youths got out of the car and began to take off its tires. Harris, who had laid down his watch, discovered it was missing. He asked one of the youths, who was sitting on a box four or five feet from the car, if he had seen it. Four or five minutes later, when the police arrived, the boys all fled. Harris identified defendant as the young man with whom he had spoken.

Defendant's mother and sister testified for the defense that defendant was at home attending a party at the time Davis was robbed. Although defendant's mother claimed only immediate family members were in attendance, his sister stated that 10 or 15 friends had been at the party.

Defendant testified that when arrested he was wearing a black knitted T-shirt and a black scarf. This mode of dress was common in his neighborhood. Defendant claimed that he had been riding with four or five friends for about 50 minutes when he was arrested. He stated that he was a participant in a lineup that was conducted about an hour after his arrest.

Officer Elliot Boston of the Chicago Police Department also testified for the defense. He had interviewed the complaining witness while Davis was still hospitalized. Davis identified himself and listed for the officer some of the items that had been stolen but was unable to give a description of his assailants. On cross-examination it was revealed that this interview was conducted within one and one-half hours of the attack. Boston stated that Davis was still bleeding and seemed to be in a daze. When it appeared as though Davis was beginning to pass out, Boston terminated the interview.

Opinion

It is defendant's first contention that the State did not establish his guilt beyond a reasonable doubt. This claim is predicated on the fact that, when hospitalized, Davis was unable to give the police a description of his attackers. We do not believe that this temporary inability mandates the conclusion that Davis' injuries so weakened his ability to observe that his subsequent positive lineup identification of defendant was untrustworthy. During the course of the attack Davis had ample

opportunity to observe defendant from a distance of two feet for a period of two minutes. When defendant demanded his watch and ring, Davis' attention was drawn to defendant's face. Due to the close proximity of defendant and his victim, this identification testimony is not weakened by the absence of evidence concerning the lighting conditions at the scene of the crime. That the police interrogation of defendant at the hospital produced no description of the robbers may be easily attributed to his dazed and groggy condition.

Defendant, however, claiming to find a factual similarity, cites People v. Reed, 103 Ill. App. 2d 342, 243 N.E.2d 628, as supportive of his contention that this identification testimony was fatally defective. We find Reed to be distinguishable; there the complaining witness' identification of his assailant rested entirely upon his assailant's dark coat and unusual revolver. He apparently did not observe his assailant's face until the police took the assailant into custody. In the instant case, in contrast, Davis viewed defendant for the two minute duration of the robbery and beating, much of the time his attention drawn to defendant's face.

The testimony of even one witness alone, if credible, is a sufficient basis for conviction. (People v. Oliver, 5 Ill. App. 3d 860, 284 N.E.2d 369.) Here, in addition to the positive identification of defendant by his victim, we have the testimony of Harris and O'Bryan. Harris identified defendant as one of a group of youths who were "stripping" a Cadillac. James Davis reported that his 1968 Cadillac had been stolen. Officer O'Bryan, responding to a police radio call regarding the stripping of this car, effected the arrest of defendant. At that time defendant was wearing a black fishnet shirt and a rag around his head. Davis described his assailant as wearing a black fishnet shirt and a rag

around his head. On this record we can find no reason to hold that the proof of defendant's guilt was inadequate.

Defendant next contends that the closing argument of the prosecution deprived him of his right to a fair trial by an impartial jury. He points to several specific comments by the State's attorney as being particularly prejudicial. Some of these comments were not objected to at trial, thereby constituting a waiver of his right to put them in issue before this court. (People v. Bambulus, 42 Ill. 2d 419, 247 N.E.2d 873.) Other statements by the prosecutor, notably references to his experience concerning attacks on police credibility in other trials and his admonition to the jury that it had no duty to defend the accused, were in response to the arguments of defense counsel. As such, they constitute a proper reply. (People v. Zuniga, 53 Ill. 2d 550, 293 N.E.2d 595.) Although the State's attorney's comment, "I'm familiar with the lighting conditions in the area of 63rd and Halsted * * *" may well have signalled an attempt to introduce extrajudicial facts, timely defense objections cut short this line of argument. Furthermore, the trial judge ordered this comment stricken. Defendant was fully protected by these actions. Moreover, it is our belief that even if all the comments placed before us by defendant were improper, they did not prejudice him in so substantial a manner that reversal of judgment would be required. (See People v. Nilsson, 44 Ill. 2d 244, 255 N.E.2d 432.)

Defendant's final contention is that the imposition of a sentence of from six to 20 years was excessive. Although we have the authority to reduce sentences under Supreme Court Rule 615(b)(3), (People v. Brooks, 51 Ill. 2d 156, 281 N.E.2d 326),

it would be inappropriate for us to exercise it in the instant case. The sentence imposed below did not exceed the limits set by the Unified Code of Corrections. (Ill. Rev. Stat. 1973 supp., ch. 38, pars. 1005-8-1(b)(3) and (c)(3).) Defendant at the age of 21 had already been convicted on seven prior occasions of misdemeanors. Furthermore, the violence and personal injury which attended this crime cannot be ignored. Although the sentence imposed below exceeded that recommended by the State, it was within the power of the trial judge to ignore this recommendation. (People v. Marshall, 6 Ill. App. 3d 224, abst.) On the instant facts we find no abuse of discretion in the exercise of this power.

Defendant claims that in People v. Pantoja, 133 Ill. App. 2d 548, abst., this court, on facts similar to those at bar, modified the sentence of an individual convicted of burglary. Defendant ignores the fact that in Pantoja we were explicit in pointing out that the absence of weapons use or violence was a major consideration in our decision. As Davis' hospitalization will attest, there was no such absence here.

We therefore affirm the judgment and sentence entered by the trial court.

AFFIRMED.

English and Sullivan, JJ., concur.

Abstract.

Per Lesson

15 I.A.³ 971



58106

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM
	)	CIRCUIT COURT
Plaintiff-Appellee,	)	COOK COUNTY
)	
vs.)	_____
)	
LUTHER LEE, a/k/a)	
LUTHER LEE CLARK,	)	HONORABLE
	)	LOUIS B. GARIPPO,
Defendant-Appellant.	)	Presiding.

*PER CURIAM (FIRST DIVISION, FIRST DISTRICT):

Luther Lee, defendant, was charged by indictment with the crime of murder, in violation of section 9-1 of the Criminal Code [Ill. Rev. Stat. 1969, ch. 38, par. 9-1]. After a bench trial, he was found guilty and sentenced to a term of 14 to 20 years. On appeal, defendant argues that the representation afforded him by appointed counsel at trial was of such low caliber as to violate due process requirements.

At trial the following evidence was adduced: Fachia A. Dishman testified that on August 3, 1970, in the early evening hours, she was in the playground area of DuSable High School with Andrew Wade, also known as Tutu Wade. The defendant walked up carrying a sawed-off shotgun and ordered Wade to put his hands up against the wall. Defendant then said, "Man, I'm tired of you fucking with me." He fired one shot and Wade fell. Dishman ran, and heard two more shots fired. She immediately telephoned the police. A short time later, Dishman saw the defendant in the 4900 block of Wabash Avenue. The defendant asked why she ran and she replied that she was scared. Dishman and defendant proceeded to Ida Mae Hospital where defendant took a trench coat and hat he

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was wearing at the time of the shooting out of the bushes in front of the hospital. He took two shotgun shells out of the pocket of the trench coat and handed them to Dishman. Dishman and the defendant then went to a lounge located at 51st Street, between Calumet and Prairie Avenues, where they stayed for five or ten minutes. They then proceeded to a liquor store between King Drive and Calumet Avenue on 47th Street, where the defendant purchased some liquor and made several telephone calls. Defendant then walked Miss Dishman home.

Dishman testified that she had seen the sawed-off shotgun approximately three weeks earlier. At that time she, the defendant, Marilyn Dunlap and Robert [last name unknown] went to the area of 77th and Carpenter, where Robert picked up the sawed-off shotgun. She testified that they then went back to the project where they saw Andrew Wade, also known as Tutu Wade, entering the building. At that time Miss Dishman said, "This is the best time to get him because we never have a chance like this." Marilyn said, "Yes, that's right," and Robert said, "No, it has to be planned." The defendant did not say anything at this time.

It was stipulated that if Chicago Police Officer Kelage were called to testify he would state that on August 3, 1970, in response to a call, he proceeded to the playground of DuSable High School. There he found the body of Andrew Wade at the rear of the building with three shotgun wounds in his body.

It was also stipulated that if Chicago Police Officer Carter were called to testify he would state that in examining the scene of the crime, he discovered a sawed-off shotgun containing one spent shell. He also found two other spent 12-gauge shotgun shells, one having the word "Tutu" scratched in the casing.

It was stipulated that if Dr. Jerry Kearns were called to testify he would state that on August 4, 1970, he performed an autopsy on the body of Andrew Wade. The body had three shotgun wounds. In Dr. Kearns' opinion, the cause of the death of Andrew Wade was a shotgun wound to the neck and spinal cord.

It was stipulated that if Thomas D. Wyanessa and Martin Jerry Weber were called to testify they would state that they are special agents for the Federal Bureau of Investigation assigned to St. Louis, Missouri. On September 22, 1971, they arrested the defendant who subsequently gave them a written statement.

In his written statement, which was introduced into evidence, defendant stated that on August 3, 1970, he was drinking gin and noticed Andrew Wade talking to his girlfriend on the school playground. Defendant proceeded to his home where he got his 12-gauge sawed-off shotgun. The gun had not been fired in some time and defendant stopped to clean it. He then went back to the playground where he ordered Wade up against the wall. Defendant stated that he pulled the trigger,

but the gun failed to fire because he had forgotten to load it. He stated that he quickly loaded the gun, aimed it at Wade and fired. At this time he seemed to lose all control of any type of rational behavior. He stated that the motive for the shooting was that Andrew Wade had on several previous occasions threatened to kill him.

Luther Lee, defendant, testified that prior to August 3, 1970, Andrew Wade, who was a member of the Black P Stone Nation, had threatened on several occasions to kill him. He stated that on August 3, 1970, he had been drinking all day and had consumed three to four fifths of wine, whiskey and beer. He approached Wade in the school yard and ordered him up against the wall. Defendant then shot Wade. Defendant stated that after the first shot he did not remember anything that had occurred. Defendant testified that after the incident in question he went to Detroit, Michigan, then to Flint, Michigan, then to New York, to Los Angeles, and finally, to St. Louis, Missouri.

Defendant's only argument on appeal is that the representation afforded him at trial by appointed counsel was of such low caliber as to violate due process requirements. In order to sustain such a position, defendant must establish actual incompetency of counsel as reflected in the manner of carrying out his duties and substantial prejudice resulting from such incompetency without which the outcome would probably have been different. People v. Goerger, 52 Ill.2d 403, 288 N.E. 2d 416; People v. Dudley, 46 Ill.2d 305, 263 N.E.2d 1.

Defendant argues that there are three instances which demonstrate incompetency of counsel: 1) when counsel failed to object to prejudicial hearsay testimony; 2) when counsel cursorily stipulated to defendant's confession; and 3) when counsel failed to raise the readily available defense of insanity.

Defendant first argues that evidence of his trial counsel's incompetency was demonstrated when his counsel failed to object to the testimony of Fachia Dishman when she testified to a conversation occurring three weeks prior to the shooting of Wade. Dishman's testimony regarding that conversation indicated that although the defendant was present, he did not say anything. Dishman testified that she suggested it would be a good time to kill Wade. Marilyn agreed, but Robert said that it had to be planned. In view of the fact that this was a bench trial where the trial judge is presumed to recognize incompetent evidence and disregard it, this testimony, even if considered improper, did not result in any substantial prejudice without which the outcome of the trial would have probably been different. The evidence of defendant's guilt was overwhelming.

Defendant next argues that evidence of his trial counsel's incompetency was demonstrated when his trial counsel stipulated to the defendant's confession given to the Federal Bureau of Investigation agents. A stipulation of evidence does not indicate incompetency of counsel. People v. Bush, 29 Ill. 2d 367, 194 N. E. 2d 308. Further, defense counsel's

stipulation to defendant's written statement did not in any way harm defendant's case, since defendant's testimony at trial was substantially the same as his written statement. In the context of this case, defense counsel's stipulation to defendant's written statement might well represent a tactical decision in the interests of candor and consistency. It cannot be said that defense counsel's stipulation resulted in any prejudice to defendant. People v. Bliss, 44 Ill. 2d 363, 256 N. E. 2d 343.

Defendant next argues that evidence of his trial counsel's incompetency is demonstrated by the fact that he failed to raise the defense of insanity. The failure to raise an insanity defense, even if it were a mistake, does not of itself show that the defendant was inadequately represented. People v. Heirens, 4 Ill. 2d 131, 122 N. E. 2d 231; People v. Hinton, 132 Ill. App. 2d 409, 270 N. E. 2d 93. Further, there is no showing that the defense of insanity could have been successfully raised in the case at bar. Defendant's own trial testimony, as well as his written statement, established that at all times he knew what he was doing until he fired the first shot. Defendant testified that it was only after that point that he seemed to lose all control.

Defendant, in his brief, concedes that each of the alleged instances of appointed counsel's misconduct, standing alone, does not demonstrate incompetency. Defendant argues that when taken together, these instances rendered the proceedings a sham and denied him due process of law.

After a careful examination of the entire record, we cannot agree with defendant's conclusion. Defense counsel was obviously prepared, had filed pre-trial motions, effectively cross-examined each witness at trial and presented evidence on behalf of his client as best he could in view of the facts of the case. Defendant did not at any time deny that he shot and killed Andrew Wade, but felt that his actions were justified in view of Wade's prior threats against him. Counsel did succeed in getting a minimum sentence on behalf of his client. After an examination of the totality of appointed counsel's conduct, we hold that defendant has failed to establish incompetency.

For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed.

Judgment affirmed.

* HALLETT, J., did not participate.

Egan



15 I.A.³ 972

58154

ROBERT MONTGOMERY, SR.,)	
)	
Plaintiff-Appellant,	)	APPEAL FROM THE CIRCUIT
	)	COURT OF COOK COUNTY.
v.)	
)	
PHILIP BRAVOS and MARY BRAVOS,	)	HONORABLE WILLIAM B. KANE,
	)	Presiding.
Defendants-Appellees.)	

Mr. JUSTICE EGAN delivered the opinion of the court:

This is an appeal from a denial of the plaintiff's petition brought under Section 72 of the Civil Practice Act. Ill.Rev.Stat. 1971, ch. 110, sec. 72.

The plaintiff, Robert Montgomery, Sr., filed a complaint to recover damages for personal injuries allegedly sustained when the motor vehicle which he was operating was struck from behind by the motor vehicle operated by the defendant, Philip Bravos. The case was assigned for trial on May 16, 1972, and on May 17, pursuant to an agreement between the parties, the trial court entered an order dismissing the suit. On May 25, a stipulation to dismiss the action was executed by the attorneys for both parties. On May 30 another order of dismissal was entered by the court, and the defendant's attorney forwarded a settlement draft in the amount of \$1326.75 to the plaintiff's attorney; that draft was never returned. A release in consideration of the agreed amount was executed by the plaintiff.

On July 18, 1972, the plaintiff filed a petition under Section 72 seeking to vacate the order of dismissal entered on May 17. His petition alleged that his medical expenses totaled \$858.20; that he understood that the pre-trial settlement recommended to him was the net amount that he would receive as a result of the settlement; and that he had gone to his attorney's office on June 9 and informed him that he would not accept the settlement.

The plaintiff's principal contention is that he entered into the pre-trial settlement agreement as a result of an excusable mistake and, therefore, the trial court abused its discretion in denying his petition. He cites Mehr v. Dunbar Builders Corp., 7 Ill.App.3d 881, 289 N.E.2d 25 for the proposition that a court is justified in

disturbing a settlement agreement if the dismissal order was entered as a result of an excusable mistake on the part of the plaintiff. With that proposition we are in complete accord, but we judge, as the reviewing court did in Mehr, that the plaintiff has failed to establish an "excusable mistake."

The record discloses that the plaintiff was in court on May 17 when the court dismissed the suit and that he had talked to the judge. The parties had gone "over the whole factual situation; [including the] problem [the plaintiff] would have in tying his additional medical expenses into the accident." The plaintiff did not testify at the hearing. It must be assumed that the plaintiff agreed to the above amount only after consultation with his attorney regarding attorney's fees, medical expenses, and litigation fees. The plaintiff does not allege that the defendant misled him. Under the circumstances we conclude that he has failed to establish an "excusable mistake" and that the trial judge properly exercised his discretion in denying the petition.

Further, any misunderstanding arising from the communications between the plaintiff and his attorney would not provide a basis for relief. Section 72 does not afford a procedure whereby a party is relieved of the consequences of his own negligence (Esczuk v. Chicago Transit Authority, 39 Ill.2d 464, 467, 236 N.E.2d 719), nor the negligence of his attorney. Danforth v. Checker Taxi Co., Inc., 114 Ill.App.2d 471, 476, 253 N.E.2d 114.

The judgment of the circuit court is affirmed.

JUDGMENT AFFIRMED.

GOLDBERG, J. and HALLETT, J. concur.

ABSTRACT ONLY.



15 I.A.³ 973

58163

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM THE
	)	CIRCUIT COURT OF
Plaintiff-Appellee,	)	COOK COUNTY.
)	
v.)	
)	
SONYA CHARLES,	)	HONORABLE
	)	KENNETH R. WENDT,
Defendant-Appellant.	)	PRESIDING.

Mr. JUSTICE HALLETT delivered the opinion of the court:

Defendant, Sonya Charles, was indicted for voluntary manslaughter growing out of the November 28, 1971, shooting of her husband, Richard L. Charles, in violation of Ill. Rev. Stat. 1969, ch. 38, par. 9-2. After a bench trial, she was convicted of involuntary manslaughter and sentenced to not less than two nor more than six years in the Illinois State Penitentiary. (Ill. Rev. Stat. 1969, ch. 38, par. 9-3.) On appeal, she argues (1) that the trial court erred when, despite her contention that she fired in the belief that she was in imminent danger of death or great bodily harm, it found that her belief was unreasonable and her action reckless; (2) that, even assuming that her belief was unreasonable, she was not guilty of involuntary manslaughter; and (3) that the sentence imposed is excessive.

The defendant testified that she shot her husband at about 7:40 a.m. on November 28, 1971, through the bathroom door of their Chicago apartment, because she felt her life was in danger. Her husband, she said, had been cruel to her and to their baby, Nicole. The night before, he had picked seven month old Nicole up off the bed and threw her into her crib. Mr. Charles hit her about seven times during their two year marriage. Once she had a black eye, and the worst time she couldn't move her arm "comfortably." In September, he obtained a gun to protect himself when he drove his cab, and he put it to her neck, saying he was kidding, but she didn't consider it kidding. When they had arguments she hid the gun. The night before the shooting, he had pushed Nicole's face

and nose under the water when the defendant was giving Nicole a bath. An argument ensued and defendant hid her husband's gun in the diaper pail in the bathroom. The next morning at about 7:30 she went to take a shower, locking the bathroom door from the inside. After about ten minutes her husband said, "What are you doing in there?" He said she had better let him in, but she said she didn't want to be bothered and that she was going to leave him. He started pounding on the door and went from cursing to threatening her life, saying he was going to kill her when he got in there. She remembered the gun in the diaper pail. She begged him to get away from the door. She did not tell her husband to get away from the door because she had a gun. She pulled the trigger and heard a cry of pain. She waited a few seconds and then went out, went to the bedroom, but her husband was not there, then went into the living room where she saw the door latch torn from the wood and saw her husband pounding on the door of apartment F across the hall. He turned around and glared at her and she shot "around him, not at him"; he had started toward her and she just didn't want him to come near her. The police arrived to find the deceased lying on his back on the hall floor, wearing only undershorts. There was a small hole under his chest. There were bullet holes in the bathroom door of defendant's apartment, two bullet holes in the door of apartment F across the hall and in the wall adjacent to the door of apartment F there was a third hole.

Involuntary manslaughter is an offense in which death results "from acts performed recklessly even though there was no intent to inflict injury," such as pulling of a loaded gun from one's pocket in a crowded tavern. (People v. Thomas (1972), 8 Ill. App. 3d 690, 693, 290 N.E. 2d 418, 420.) Defendant argues that under the circumstances here, her belief in the necessity of deadly force was a reasonable one. However, she had apparently never reported the deceased's prior actions to the police and it is undisputed that

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the deceased, at the time he was shot, was unarmed, that he was dressed only in a pair of shorts, that he was "pounding" on the door, trying to open it, but not that he was trying to break it in. Defendant did not warn the deceased that she had a gun or that she was going to fire it through the door at him. Defendant's belief that her life was threatened was patently unreasonable and her act of shooting through the bathroom door, knowing that her husband was on the other side, without the least warning to him, when she knew him to be unarmed (she had his gun), was manifestly a reckless act in utter disregard of her husband's safety. Under such she is guilty of involuntary manslaughter. See People v. Reece (1970), 123 Ill. App. 2d 97, 100-101, 259 N.E. 2d 619.

As was well stated in People v. Adams (1969), 113 Ill. App. 2d 205, 252 N.E. 2d 35, at page 215:

"Self-defense is always a question of fact to be determined by the trier of fact. People v. Pena, 72 Ill App2d 305, 219 NE2d 667; People v. Colson, 70 Ill App2d 447, 217 NE2d 348; People v. Millet, 60 Ill App 2d 22, 208 NE2d 670; People v. Jordan, 18 Ill2d 489, 165 NE2d 296. When, after raising this defense, there is a guilty finding, a reviewing court will not reverse that determination unless it is so unsatisfactory or improbable as to justify a reasonable doubt of the defendant's guilt."

We conclude that, under the evidence in this case, the trial court could justly determine that the defendant's belief that her life was in danger was unreasonable and her action in firing a gun through the locked door reckless. This disposes of contentions (1) and (2) and we therefore affirm the conviction.

With respect to the sentence, in view of the fact that the defendant had no prior criminal record and is the mother of two young children, we do feel that the sentence of two to six years is excessive. We therefore, under what was Ill. Rev. Stat. 1971, ch. 38, par. 121-9 (b)(4), but is now Illinois Supreme Court Rule 615 (b)(4), reduce the sentence to not less than one year nor more

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than three years. As so modified, the judgment is affirmed.

Judgment affirmed as modified.

GOLDBERG AND EGAN, JJ., concur.

Abstract only.



No. 57590

PEOPLE OF THE STATE OF ILLINOIS,)	
	)	APPEAL FROM THE CIRCUIT
Plaintiff-Appellee,)	
	)	COURT OF COOK COUNTY.
vs.)	
	)	HONORABLE
CHARLES COLLINS and JEROME	)	JOHN J. CROWLEY,
HOWARD,	)	PRESIDING.
)	
Defendants-Appellants.)	

PER CURIAM:

Charles Collins and Jerome Howard were tried in a bench trial with Joseph Walker, Larry Lindsey and Florentino Rios for the offense of theft, in violation of section 16-1 of the Criminal Code. (Ill.Rev.Stat. 1971, ch.38,par.16-1.) All five defendants were found guilty as charged and were sentenced accordingly, Charles Collins receiving a sentence of six months in the House of Correction and Jerome Howard being placed on probation for a period of one year on condition that he serve six months in the House of Correction. Charles Collins and Jerome Howard alone prosecute this appeal, raising the sole contention that the evidence was insufficient to prove them accountable for the theft.

At a hearing on a motion to suppress certain evidence, Police Officer Shumaker testified that on December 15, 1971, he received a radio dispatch that two women's purses had been stolen on the north side of Chicago and that the suspects were four or five male Negroes riding in a 1963 Buick automobile bearing no license plate, that he stopped a vehicle of such description about five minutes later containing the five defendants on North Lake Shore Drive in the city about a mile and a half from where the thefts allegedly occurred. Upon his approaching the vehicle after it was stopped, he observed two women's purses on the front seat situated between defendant Rios and defendant-driver Lindsey. One of the purses was found to belong to Miss Sara Brown, the complaining witness in the case, and upon further inspection of the vehicle, weapons were discovered. All five defendants were placed under arrest. (The motion to suppress was denied.)

1851-1852

At trial Sara Brown testified that at about 7:30 p.m. on December 15, 1971, she was walking along the street near 4303 North Paulina Street with her sister, Hermina Brown, and their girl friend, Margaret Murphy, when she observed a man, whom she identified at trial as defendant Rios, run toward her and take her purse. She testified that the man ran around the street corner, that she followed him, and that he proceeded about a quarter of a block where he stopped at a parked automobile; Rios then turned around and the witness was able to get a clear view of him under a lighted street light. Miss Brown testified that Rios and two other men entered the automobile, but she was unable to identify any of the other men in that vehicle or to say how many occupants it contained. The witness proceeded to her home a short distance away where she telephoned the police and gave them a description of the vehicle in question. The witness later identified Rios at a police line-up, but was unable to identify anyone else in connection with the theft.

Hermina Brown was called as a witness for the State but was unable to identify either the automobile involved or any person in connection with the theft.

Officer Shumaker was called at trial as a witness for the State, and it was stipulated that the testimony which he gave at the hearing on the motion to suppress would stand as testimony at the trial. The officer also testified that Miss Sara Brown identified only defendant Rios at the police line-up. It was further stipulated that all five defendants were shown in the line-up in question, but that Sara Brown identified only defendant Rios therefrom.

Defendants Howard, Walker, Collins and Lindsey testified for the defense and stated generally that they all resided on the south side of Chicago. Howard, Walker and Collins were in a restaurant on the north side of the city about 6:00 p.m. on that date. Lindsey picked the others up in his automobile about that time after he had "heard" that they were on the

north side that day. Rios was picked up by Lindsey "walking on the streets" about ten minutes later and a few blocks away. No one exited the vehicle after they had entered it that evening; that they may or may not have been in the vicinity of 4303 North Paulina Street on that day; and that they did not take Miss Brown's purse.

The foregoing summary of the evidence reveals that the State failed to prove defendants Charles Collins and Jerome Howard accountable for the offense of theft in conformance with the requirements of section 5-2 of the Criminal Code relating to accountability. (Ill.Rev.Stat. 1971, ch.38,par.5-2.)

As noted in People v. Ramirez (1968), 93 Ill.App.2d 404, 410, 236 N.E.2d 284, three factors must be proven by the State in order to bring an accused within the purview of the accountability statute: (1) that he solicited, aided, abetted, agreed or attempted to aid another in the planning or commission of the offense; (2) that his participation must have taken place either before or during the commission of the offense; and (3) that it must have been with the concurrent, specific intent to promote or facilitate the commission thereof. The defendant in Ramirez was not proven to have been accountable for the unlawful act of the principal accused. See also People v. Tillman (1971), 130 Ill.App.2d 743, 265 N.E.2d 904.

In the instant case, the evidence adduced by the State shows only that there was a possibility that defendants Charles Collins and Jerome Howard may have been in the Lindsey vehicle at the time of the theft, since Miss Sara Brown testified merely that she observed defendant Rios and two other men enter the vehicle and that she was unable to tell how many occupants were in that vehicle at the time; she was also unable to identify anyone other than Rios as having been connected with the theft or the vehicle although it was stipulated that the other four defendants were in the police line-up at which she identified Rios as the assailant.

The State argues that the evidence adduced by the defense proved defendants Collins' and Howard's complicity in the theft. That evidence at best shows only that they entered the Lindsey vehicle at about 6:00 p.m., that Rios entered the Lindsey vehicle about ten minutes after they did, and that neither they nor Rios exited the vehicle until the time of the arrest. The evidence as to the time when Rios entered the Lindsey vehicle is to be compared to the State's evidence that Miss Brown observed Pios enter the vehicle sometime after 7:30 p.m. and in the presence of "other men."

The evidence as a whole shows no more than defendants Charles Collins and Jerome Howard were present in the Lindsey vehicle at the time of the arrest, in the company of defendant Rios and the stolen merchandise. There is no evidence, either direct or circumstantial, that defendants Collins and Howard in any manner aided, abetted, or otherwise contributed to or participated in the offense of the theft by Rios. Their convictions for the theft based upon the theory of accountability must therefore be reversed.

The cases cited by the State in support of its theory of accountability are inapposite to the instant circumstances: People v. Thicksten (1958), 14 Ill.2d 132, 150 N.E.2d 813; People v. Brendeland (1957), 10 Ill.2d 469, 140 N.E.2d 708; People v. Bracey (1969), 110 Ill.App.2d 329, 249 N.E.2d 224.

For these reasons, the judgments of the circuit court of Cook County, finding defendants Charles Collins and Jerome Howard guilty of the offense of theft, are reversed.

Judgments reversed.

Third Division. Justice MEJDA did not participate.

CHICAGO BAR
ABST.
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ASSOCIATION

15 I.A.³ 1002

PEOPLE OF THE STATE OF ILLINOIS,)
)
 Plaintiff-Appellee,)
)
 vs.)
)
 RICHARD BURRAGE,)
)
 Defendant-Appellant.)

APPEAL FROM THE CIRCUIT
COURT OF COOK COUNTY.
HONORABLE
KENNETH R. WENDT,
PRESIDING.

Richard Burrage, defendant, was charged by indictment with the crime of aggravated battery, in violation of section 12-4 of the Criminal Code (Ill.Rev.Stat. 1971, ch.38,par.12-4). After a bench trial, defendant was found guilty and sentenced to a term of one and one half years to four and one half years. On appeal defendant contends that he did not knowingly and understandingly waive his right to a jury trial; and that the evidence was insufficient to establish his guilt beyond a reasonable doubt.

At trial, Terry Alboyd, Alonzo Johnson, Randy Johnson, Dennis Johnson and Thomas Johnson testified that on June 21, 1971, in the late afternoon, they were visiting Eddie Williams at 808 South Kilbourn, Chicago, Illinois. They were sitting on the front porch of Eddie Williams' home when Eddie Williams went across the street to talk to someone in front of the home at 807 South Kilbourn. A man came out of the house at 807 South Kilbourn and slapped Eddie Williams, knocking his hat off. As Williams bent down to pick up his hat, the man shot the hat. When Eddie Williams bent down a second time to pick up the hat, the man shot Eddie Williams and fled. The defendant came out of the house at 807 South Kilbourn carrying a shotgun. As Eddie Williams attempted to flee, the defendant shot him. Defendant then turned his shotgun toward the porch of 808 South Kilbourn and fired. The men attempted to flee and the defendant fired a second time. Each of the witnesses was struck by the shotgun pellets in various parts of their bodies.

Ray Wolfe and Chris Grogman, Chicago Police officers, testified that on June 21, 1971, they responded to a call and proceeded to 808 South Kilbourn, Chicago, Illinois. Upon their arrival, they observed four men, standing in front of that address, who were bleeding from different parts of their bodies. Two other men were found face down in the gangway of that address. As the officers were helping the wounded men into the squadrol, the defendant appeared on the scene and was identified as the person who had shot the victims. Defendant ran into the house at 807 South Kilbourn where he was placed under arrest. As the defendant was being taken from that address, Officer Grogman found two expended shotgun shells on the front porch.

Eugene Burrage, the defendant's father, testified that on June 21, 1971, the defendant left the family home at 807 South Kilbourn at approximately 3:30 p.m. The defendant was not in the home at the time of the shooting. The next time he saw the defendant, the police were bringing him into the house.

Eddie Theresa Swayzer testified she was in the Burrage's home at the time of the shooting, and defendant was not present.

J.D. Brooks testified that at the time of the shooting, the defendant was in his home at 744 South Kilbourn.

Defendant contends that he did not knowingly and understandingly waive his right to a jury trial. The record discloses the following colloquy concerning a jury trial:

"THE COURT: You're entitled to a jury trial to see if they render a verdict of guilty or innocent on the charge of aggravated battery, you understand that, sir?

MR. PRIDE (defense counsel): You're entitled to a jury trial.

DEFENDANT: Yes, sir.

THE COURT: I understand you wish to waive this right and to be tried by me.

DEFENDANT: Yes, sir.

THE COURT: So kindly indicate and sign what we call a jury waiver. I assume of course, Mr. Pride, the plea is not guilty.

MR. PRIDE: Plea of not guilty."

There is no precise formula for determining whether a defendant's waiver of the right to a jury trial is knowingly and understandingly made. (People v. Richardson (1965), 32 Ill. 2d 497, 207 N.E.2d 453.) Each case depends upon the particular facts and circumstances of that case. (People v. Wesley (1964), 30 Ill.2d 131, 195 N.E.2d 708.) A lengthy explanation of the consequences of a jury trial is not a prerequisite of the validity of a jury waiver. People v. Bradley (1970), 131 Ill. App.2d 91, 266 N.E.2d 469.

In the present case, defendant was represented by privately retained counsel. The trial judge informed the defendant of his right to a jury trial, as did his privately retained counsel. When asked if he wished to waive a jury trial and be tried by the court, defendant replied affirmatively. Defendant voluntarily signed the jury waiver. Under these circumstances we conclude that the defendant knowingly and understandingly waived his right to a jury trial. People v. Lenair (1970), 130 Ill.App.2d 147, 264 N.E.2d 525.

Defendant also contends that the State's evidence was improbable, contradictory and was insufficient to establish his guilt beyond a reasonable doubt. In a bench trial, it is the duty of the trial judge to determine the credibility of witnesses and the weight to be given to their testimony. Only where the evidence is so unsatisfactory as to raise a reasonable doubt of the defendant's guilt will the finding of the trial court be disturbed. People v. Hampton (1969), 44 Ill.2d 41, 253 N.E.2d 385; People v. Pointer (1972), 6 Ill. App.3d 113, 285 N.E.2d 171.

In the instant case, the testimony of five eyewitnesses established that the defendant without provocation fired three

shotgun blasts, hitting each of the complainants. The defendant then fled. The testimony of two Chicago Police officers established that the defendant subsequently returned to the scene, challenged the victims and then ran into his home, where he was arrested. As the defendant was being taken from his home, two expended shotgun shell casings were found on the defendant's front porch. This evidence was sufficient for the trial court to determine that the defendant was proved guilty beyond a reasonable doubt. Minor discrepancies in the testimony of witnesses, such as those pointed out by defendant in the instant case, affect only the credibility of witnesses, which is a matter for the trier of fact to determine. (People v. Thomas (1970), 127 Ill.App.2d 444, 262 N.E.2d 495.) On the basis of the record before us, we cannot say that the trial court's determination was erroneous.

For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed.

Judgment affirmed.

Third Division. Justice Mejda did not participate.



15 I.A.³ 1008

NO. 58330

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM
	)	CIRCUIT COURT
Plaintiff-Appellee,	)	COOK COUNTY
)	
vs.)	
)	
CECIL PAGE and WILLIE CARTER,	)	HONORABLE
	)	LOUIS B. GARIPPO,
Defendants-Appellants.	)	PRESIDING.

PER CURIAM:

Cecil Page and Willie Carter, defendants, were charged by indictment with the crime of armed robbery, in violation of section 18-2 of the Criminal Code (Ill. Rev. Stat. 1971, ch. 38, par. 18-2). Willie Carter was also charged by indictment with unlawful use of a weapon within five years of conviction of a felony, in violation of section 24-1(a)(4) of the Criminal Code (Ill. Rev. Stat. 1971, ch. 38, par. 24-1(a)(4)). After a bench trial both defendants were found guilty as charged in the indictments. Defendant Page was sentenced to a term of five to eight years on the charge of armed robbery. Defendant Carter was sentenced to a term of seven to twelve years on the charge of armed robbery and a term of one year to one year and one day on the charge of unlawful use of a weapon within five years of conviction of a felony, the sentences to run concurrently. On appeal, defendant Page argues that his minimum sentence is excessive. Defendant Carter argues that his sentence for armed robbery is excessive and that he was improperly convicted and sentenced for two offenses which arose out of the same course of conduct.

The evidence as adduced at trial is summarized: On February 17, 1972, Mr. A. D. Jackson was driving his cab in the vicinity of Lake and Clark Streets in Chicago, Illinois, when he picked up the two defendants as passengers. Defendants informed him that they wanted to go to 2600 West. When the cab reached approximately 2600 West Monroe, defendant Carter pulled a gun and announced a robbery. Jackson was instructed

to drive to a nearby vacant lot, where defendant Page took approximately \$17 from his pocket. Jackson was then forced to get into the rear seat of the cab with defendant Carter, while defendant Page drove the cab. Defendant Carter told Jackson that they were going to take him out to the suburbs and blow his brains out. At approximately Harrison and California, Jackson observed a police car and jumped out the door of the cab. Jackson informed the police officers of what had occurred and they gave chase. The cab jumped the curb while going west on Harrison Street. The police officers observed the defendants Page and Carter running from the scene and were able to apprehend both a short distance away. A search of defendant Page revealed 16 one-dollar bills and several dollars in change. A search of defendant Carter revealed a Smith and Wesson blue steel revolver and a patrolman's special police badge. Defendant Carter stipulated that he had been convicted of robbery on September 11, 1970, and was placed on probation for a period of two years.

Willie Carter, defendant, testified that on February 17, 1972, he was returning from the home of a friend and was arrested while going east on Harrison. He denied ever entering Jackson's cab or robbing him. Carter testified that he was employed as a security guard night watchman for Great Lakes Security and that pursuant to that occupation, he had the gun in his possession. Cecil Page, defendant, testified that on February 17, 1972, he was arrested on Sacramento Boulevard in Chicago, Illinois. He denied ever entering the cab of Jackson or robbing Jackson.

Defendant Page argues that his minimum sentence of five years for armed robbery is excessive and should be reduced to a term of four years. The State in its brief concedes that defendant Page's minimum sentence is excessive and agrees that the minimum sentence should be reduced to a term of four years. At the time of defendant Page's sentence, the statutory minimum for armed robbery was five years (Ill. Rev. Stat. 1971, ch. 38,

par. 18-2(b)). Under the Unified Code of Corrections, which is applicable to cases pending on appeal (People v. Chunich, 53 Ill. 2d 572, 295 N.E. 2d 1), armed robbery is a Class 1 felony (Ill. Rev. Stat. 1972 Supp., ch. 38, par. 18-2). The minimum sentence for a Class 1 felony is four years (Ill. Rev. Stat. 1972 Supp., ch. 38, par. 1005-8-1(b)(2)). At the time of his conviction, defendant Page was 20 years old and had no prior criminal record. Under these circumstances, we deem it appropriate to reduce defendant Page's minimum sentence to a term of four years.

Defendant Carter first argues that his sentence for armed robbery is excessive and that his case should be remanded for re-sentencing under the provisions of the Unified Code of Corrections. The Unified Code of Corrections provides that for armed robbery, which is a Class 1 felony, the sentence shall be a term of four years unless the court, having regard for the nature and circumstances of the offense and the history and character of the defendant, sets a higher minimum term (Ill. Rev. Stat. 1972 Supp., ch. 38, par. 1005-8-1(c)(2)). In the case at bar, the trial court, after considering the facts as adduced at trial and defendant's prior record, sentenced Carter to a term of seven to twelve years. Carter's sentence is permissible under the Unified Code of Corrections and, considering the facts as adduced at trial and defendant's prior record, the sentence is not excessive.

Defendant Carter's second contention is that he was improperly convicted and sentenced for both armed robbery and unlawful use of a weapon within five years of conviction of a felony since both offenses arose out of the same course of conduct. Where a defendant is convicted of two offenses which arise out of the same conduct, he cannot be sentenced for both. (People v. Sykes, 10 Ill. App. 3d 657, 295 N.E. 2d 323.) However, a defendant may properly be sentenced for separate offenses if the crimes are distinct and do not arise from the same conduct

even though closely related in time. (People v. Johnson, 44 Ill. 2d 463, 256 N.E. 2d 323.) In People v. Barry, 6 Ill. App. 3d 836, 286 N.E. 2d 753, the defendant argued that he was improperly sentenced for aggravated assault and unlawful use of a weapon since both transactions arose out of the same course of conduct. We rejected that contention, holding that the offense of unlawful use of a weapon was separate and distinct from aggravated assault and was committed by merely carrying the gun concealed upon his person.

In the case at bar, defendant committed the offense of unlawful use of a weapon by carrying a weapon upon his person. That offense was completed prior to the armed robbery of Jackson. The armed robbery of Jackson was separate and distinct from the act of carrying a pistol concealed on his person. The offense of armed robbery requires different elements of proof and is clearly distinct from the offense of unlawful use of a weapon. Defendant Carter was properly sentenced for both armed robbery and unlawful use of a weapon within five years of conviction of a felony.

For the foregoing reasons, the minimum sentence of defendant Page is reduced to a term of four years, so that his sentence shall be four to eight years, and as modified, the judgments of the circuit court of Cook County are affirmed.

Affirmed as modified.

Second Division

Justice Hayes did not participate.

Publish abstract only.



15 I.A.³ 1010

58830

PEOPLE OF THE STATE OF ILLINOIS	)	Appeal from the
EX REL. CHARLES BROWN,	)	Circuit Court of
Relator-Appellant,	)	Cook County
vs.	)	Honorable
	)	Joseph A. Power,
JOHN W. TWOMEY, WARDEN, ILLINOIS	)	Presiding.
STATE PENITENTIARY, JOLIET,)	
ILLINOIS,)	
Respondent-Appellee.))	

PER CURIAM: *

Charles Brown (relator) appealed from the dismissal by the circuit court of his Petition for Writ of Habeas Corpus and from the alleged denial of his motion for discovery filed in connection with that Petition.

The Public Defender of Cook County has filed in this court a motion for leave to withdraw as appellate counsel, supported by a brief pursuant to Anders v. California, 386 U. S. 738, wherein counsel states that the sole question which may be raised on appeal, which in final analysis is without merit, is whether relator was denied procedural due process of law in his habeas corpus hearing. Relator was sent copies of the motion and the brief and was allowed additional time within which to file any points he desired to support the appeal; relator has not responded.

Relator was found guilty with a co-defendant of the robbery of a passenger aboard a Chicago Transit Authority train and was sentenced to a term of 5 to 10 years in the penitentiary. The judgment of conviction was affirmed by this court on direct appeal in People v. Brown, 76 Ill. App. 2d 362, 222 N. E. 2d 227. Relator's subsequent petition filed pursuant to the Illinois Post-Conviction Hearing Act was dismissed without an evidentiary hearing and the dismissal was affirmed by the Supreme Court in People v. Brown,

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1890-1891

51 Ill. 2d 271, 281 N. E. 2d 682. (Ill. Rev. Stat. 1971, ch. 38, par. 122-1 et seq.)

Relator thereafter filed the instant Petition for Writ of Habeas Corpus (Number H.C. 46398) wherein he alleged that the complaining witness at trial gave perjured testimony as to his residence and working addresses and that the Chicago Transit Authority police filed a false police report that relator and his co-defendant were arrested with a third party for the offense in question, whereas that third party was neither implicated in nor arrested for the offense until several weeks thereafter. The Petition concluded that the foregoing circumstances "played an integral part in the conviction of" relator and that the "true facts" were unknown to relator at the time of the trial. Relator also filed a motion for discovery and the production of certain police reports and witness' statements which he alleged were "essential to [his] burden of proof to establish his contentions now pending on writ of Habeas Corpus in this Court." The record discloses that the Petition for Writ of Habeas Corpus was dismissed after a brief hearing on the State's motion to dismiss; the record fails to disclose any disposition of the discovery and production motion filed by relator, although relator's notice of appeal to this court is filed from the "denial of habeas corpus and motions for discovery."

The Petition for Writ of Habeas Corpus alleges no defect in the trial court's jurisdiction to try relator on the robbery charge, nor does it allege any circumstances which occurred thereafter entitling him to a discharge, as required by statute. Ill. Rev. Stat. 1971, ch. 65, par. 22; People ex rel. Skinner v. Randolph, 35 Ill. 2d 589, 221 N. E. 2d 279. The Petition was properly dismissed under the circumstances, and its dismissal presents no ground upon which an appeal in this case can be based.

Whether the motion for discovery and production of documents was considered by the trial court is immaterial in light of the matters which it sought and the purposes for which those matters

were intended. The Petition for Writ of Habeas Corpus contained allegations irrelevant to the grounds necessary for the granting of relief under the habeas corpus statute; the motion for discovery and the production of documents which sought matters to support that which was alleged in the Petition was likewise immaterial to the issues in a habeas corpus proceeding.

The relief requested in the instant Petition may not stand as relief sought by way of a petition under the post-conviction statute, as provided in People ex rel. Palmer v. Twomey, 53 Ill. 2d 479, 292 N. E. 2d 379, since relator has heretofore filed a petition for relief under that statute, which petition was found wanting by both the trial court and the court on review. (People v. Brown, 51 Ill. 2d 271, 281 N. E. 2d 682.)

Upon independent review of the record by this court in discharge of our duty under the Anders decision, we have found no additional ground upon which an appeal in this case can be predicated. We conclude that the appeal is frivolous and wholly without merit.

The motion of the Public Defender of Cook County for leave to withdraw as appellate counsel is accordingly allowed, and the judgment of the circuit court of Cook County is affirmed.

MOTION ALLOWED.
JUDGMENT AFFIRMED.

* SECOND DIVISION, FIRST DISTRICT
HAYES, J., did not participate

PUBLISH ABSTRACT ONLY.

No. 57397



PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM
	)	CIRCUIT COURT
Respondent-Appellee,	)	COOK COUNTY
)	
vs.)	
)	
GEORGE W. COLES,	)	HONORABLE
	)	KENNETH R. WENDT,
Petitioner-Appellant.	)	PRESIDING.

PER CURIAM:

After a non-jury trial, George W. Coles was convicted of armed robbery and sentenced to a term of not less than two nor more than six years. The conviction was affirmed on direct appeal to this court. People v. Coles (1973), 10 Ill. App. 3d 1060, 295 N.E. 2d 503. The instant appeal is from the trial judge's denial of defendant's motion under section 72 of the Civil Practice Act to vacate the conviction and sentence and for a new trial. Ill. Rev. Stat. 1971, ch. 110, par. 72. Petitioner contends (1) that the trial court improperly denied his request for a new trial as he would "very likely" have been acquitted if the newly discovered evidence had been presented at the original trial, and (2) the trial court's suggestion that if the defendant passed a lie detector test he would be granted a new trial denied defendant due process.

The facts of the case are set out in detail in the earlier opinion of this court and may be summarized for the purpose of this appeal as follows: The complainant, Clara Gartner, testified that on October 28, 1970, about 5:45 P.M., she was robbed by a man with a gun whom she identified at trial as the defendant. Defendant took her purse, six or seven dollars, a Carson Pirie Scott charge plate, alien identification card, library card, and a Michael Reese identification card. The next day she identified the defendant in a lineup. Defendant's mother testified that defendant was with her at 5:25 P.M. on the day in question

and the defendant, himself, testified that he left the pool hall about 5:00 P.M. that afternoon to meet his mother at 34th and Halsted. One Elizabeth Jackson also testified that she was arrested October 29, 1970, at the Carson Pirie Scott store in Oak Lawn, along with Peggy Chapman, because they had a charge plate belonging to the complainant which she had obtained from John Carey and Maurice Frye, not from the defendant. Peggy Chapman did tell the police that defendant George Coles had given them the card and at first she did not tell the truth to the police; she had known George Coles approximately two years and on one occasion had lived with him and his wife for two or three months.

Defendant's section 72 petition alleged that he and his mother had made diligent efforts to obtain witnesses during the trial, that he could not find Newana Watts, and was "forced to trial with such witnesses as he had" after the trial court's denial of a motion for continuance on July 7, 1971, that Miss Watts' testimony would "clear up the problem of who stole the cards" and robbed the victim and was not merely "cumulative" of Miss Jackson's testimony at the trial. The attached affidavit of Newana Watts stated that on October 28, 1970, Maurice Frye, in the presence of John Carey, offered her a Carson Pirie Scott & Co. credit card that Frye said he had obtained by robbing a lady. When she refused the card, Frye offered one "Valerie" the charge card and she accepted it. The affidavit added that a stranger might mistake Coles for Frye.

When the case was first called on December 30, 1971, the trial court remarked: "Now, without going back through the whole case, does that affidavit of this lady say in direct conflict of the testimony of the alleged victim?" Counsel for defendant summarized the affidavit of Miss Watts and the judge commented on its value by saying: "Well, you have a right to file it." The case was continued until January 28, 1972, and then to February 25, 1972, when the assistant public defender stated in

open court and without contradiction that the court had entered the section 72 petition "with the suggestion that if Mr. Coles' polygraphic examinations from two polygraphic examiners (sic) and passed both of them, you would then grant a new trial and transfer the case away." He then informed the court that his client had decided not to take such a test. After hearing argument of counsel, the judge denied the petition, commenting that the defendant had had nine months to "get" his witnesses.

Applications for new trial on the grounds of newly discovered evidence are not favored and the trial court's discretion in denying such an application will not be disturbed except in case of manifest abuse. To warrant a new trial, the evidence "must be of such conclusive character that it will probably change the result on re-trial, it must be material to the issue, it must have been discovered since the trial, and be of such character that it could not have been discovered prior to trial by the exercise of due diligence." People v. Howze (Fifth District: 1972), 7 Ill. App. 3d 60, 69, 286 N.E. 2d 507. Applying these standards to the present case, the Watts' affidavit is not sufficient to require a new trial. Assuming its credibility, it is somewhat corroborative of the testimony of Elizabeth Jackson at the original trial. But, as the remarks of the trial judge indicate, even if believed, the testimony of Misses Watts and Jackson does not in any way affect the weight to be given to the positive identification by the complainant of the defendant as the man who robbed her on October 28, 1970. The defendant's failure in the nine months between his arrest and conviction to produce this evidence does not show the proper diligence and it is arguable whether this evidence could properly be called "newly discovered" at all. The trial court properly refused to grant a new trial because the alleged newly discovered evidence would not have altered the court's decision and because the proper showing of diligence was not made by the petitioner.

While it is true that a suggestion by the trial judge that the defendant might acquit himself by taking a lie detector test is reversible error when made immediately at the close of all of the evidence in a criminal trial (People v. Nimmer (1962), 25 Ill. 2d 319, 321, 185 N.E. 2d 249), the trial judge's remarks here were made nearly six months after the trial was completed and after he had indicated to counsel in open court his belief that the section 72 petition was without merit.

Accordingly, the judgment of the circuit court of Cook County is affirmed.

Judgment affirmed.

Second Division, Hayes, J. not participating.

Publish abstract only.



15 I.A.³ 1046

57911

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
Plaintiff-Appellee,	)	Circuit Court of
	)	Cook County,
vs.)	
	)	Honorable
LOUIS MUDD,	)	Thomas P. Cawley,
Defendant-Appellant.	)	Presiding.

PER CURIAM:

Following a bench trial in the circuit court of Cook County, the defendant, Louis Mudd, was convicted of the following charges: (1) Failure to carry a State firearm owner's identification card in violation of Ill.Rev.Stat. 1971, ch. 38, par. 83-2, for which he was sentenced to 30 days in the House of Correction; (2) failure to register a firearm with the city collector of the City of Chicago in violation of chapter 11, section 1-7 of the Municipal Code of the City of Chicago, for which he was fined \$50; and (3) of resisting a police officer in the performance of his duties in violation of chapter 11, section 33 of the Municipal Code of the City of Chicago, for which he was fined \$50. On appeal, defendant argues he was not proven guilty beyond a reasonable doubt because the evidence showed he obtained the firearm in self-defense, he had only "temporary possession" and did not own the weapon, and that the sentence of 30 days was excessive for a defendant with no prior criminal record who was gainfully employed and supported a wife and four children.

Chicago Police Officer Thomas Valley testified that in response to a call, he proceeded to the apartment of James and Ida Clifton at 5572 W. Gladys and saw Mr. Clifton outside the apartment. The officer heard screaming coming from inside the apartment and he broke the door down and went inside. When he entered the apartment, he saw the defendant standing at the doorway holding an "automatic", which was loaded. The officer, who was in uniform, identified himself and told the defendant to drop the weapon, the defendant wouldn't and the officer grabbed his arm, a "scuffle"

ensued, the gun was thrown to the floor and underneath a chair, and the defendant was arrested. Defendant was asked to but did not produce a State or City firearm owner's identification card. The officer also identified the weapon which, along with the bullets, was admitted into evidence.

The defendant testified that at the time in question, he and Mrs. Clifton, his "girlfriend", were at the apartment arguing. She had the gun and said she was going to kill him with it, he took the gun away from her. When the policeman came through the door, they were still arguing and he had the gun in his hand. The policeman did identify himself as a policeman and was in uniform. Defendant put the gun on the chair. When asked by his counsel if he threw the gun under the chair or put it on the chair, defendant responded: "Well, one of the two. I was drinking. I think I put it in the chair." He denied the gun was his and said it belonged to Mrs. Clifton and that he took it away from her because she said she was going to shoot him with it. On cross-examination, he testified he had more than five drinks of Seagram's V.O., but wasn't drunk. He said he didn't "think" he had struggled with the policeman.

Defendant contends that his possession of the gun was innocent since it came about when he took the gun from Mrs. Clifton, who was threatening to use it to shoot him. He cites Commonwealth v. Atencio (1963), 345 Mass.627, 189 N.E.2d 223, in which the Supreme Judicial Court of Massachusetts reversed a conviction for carrying an unregistered firearm where the defendant had participated in a game of Russian roulette. The court held there, under the circumstances where the source and ownership of the weapon were unclear, that "temporary possession" of the revolver during the game was not the equivalent of carrying a firearm on the person as specified in the Massachusetts statute, stating (345 Mass. 627, 631):

"The idea conveyed by the statute is that of movement, 'carries on his person or under his control in a vehicle'."

In Johnson v. State (1971), _____ Ind._____, 269 N.E.2d 879, 884

cert. den., 92 S. Ct. 958, 405 U. S. 921, 30 L. Ed. 2d 792, police officers responding to a report of a gun shot came upon two men near an automobile and asked the two men who had the gun. The defendant then voluntarily surrendered his gun to the police. The Supreme Court of Indiana rejected the contention that the defendant could plead self-defense, stating:

"The instruction is further in error in that it presumes that even though he was carrying the pistol in the vehicle unlawfully that his possession suddenly became lawful when he became apprehensive of personal attack. This is not the law. Had the pistol been in a location which was lawful, and the appellant obtained it from such a position to defend himself, we might have a legitimate question. ... Burns Ind.Stat. 1956 Repl. section 10-4736 makes no exceptions for a person to carry a weapon for the purpose of self defense."

Similarly, in People v. Foster (Fourth Dist.: 1961), 32 Ill. App.2d 462, 470, 178 N.E.2d 402, the court upheld a refusal to instruct the jury on self-defense where the charge was carrying a concealed weapon, but on the ground that there was no evidence presented at trial as to why the defendant was carrying a weapon.

For the purposes of this case, the State admits that the legislature did not intend to punish persons who with justification temporarily possessed a weapon without obtaining the required card, but claims that the facts in the instant case do not make out a claim of self-defense since the evidence indicated defendant's claim was false. On the one hand, the defendant claims his testimony must be accepted because it was not directly contradicted by a State witness and, on the other hand, the State claims that the defendant's evidence can be disregarded because it is simply a matter of credibility for the trial court, that the judge did not have to believe the defendant's testimony. However, even if the court did not believe the defendant's story, it does not follow that the contrary of the defendant's testimony has thereby been properly proved. The rule is that "before a conviction can properly be had on circumstantial evidence, the guilt of the accused must be so thoroughly established as to exclude any reasonable hypothesis of his innocence." People v. DiVito (1966), 66 Ill.App.2d 282, 289, 214 N.E.2d 320.

The evidence here showed only that the defendant had the weapon in his possession when the officer entered. If the defendant's story was untrue, the State could have called Clifton or Mrs. Clifton, or both of them. The screams the officer heard when outside the apartment were not inconsistent with a hypothesis that the defendant obtained possession of the weapon innocently, that is by taking it from Mrs. Clifton in defense of his own person as he claimed. Defendant's fleeting possession of the weapon subsequent to the officer's entry was not sufficient to support a conviction under these circumstances. Since there was thus created a reasonable doubt of defendant's guilt, his conviction and sentence must be reversed.

As to the two City charges, which were listed in the notice of appeal, the record does not show that a copy of the notice of appeal was served on the City of Chicago. Nor were copies of the briefs filed in this court served upon the City of Chicago. Defendant has, therefore, not properly perfected an appeal from the City charge as required by Supreme Court Rule 303(d) and he has not argued any points concerning the City charges in his brief. Accordingly, the defendant's appeal from his conviction on the City charges in violation of the Municipal Code of the City of Chicago must be dismissed. People v. Claudio (1973), 13 Ill.App.3d 537, 539, 300 N.E.2d 791.

Defendant's appeals from the two convictions for violation of the Municipal Code of the City of Chicago are dismissed for failure to comply with Supreme Court Rule 303(d), and the judgment of the circuit court of Cook County, convicting and sentencing the defendant on the charge of failure to carry a State firearm owner's identification card, is reversed.

REVERSED IN PART;
DISMISSED IN PART.

THIRD DIVISION: Justice Mejda did not participate.



15 I.A. 10497

58316

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
Plaintiff-Appellee,	)	Circuit Court of
	)	Cook County.
vs.)	
	)	Honorable
MARIO P. RUIZ,	)	Irwin Cohen,
Defendant-Appellant.	)	Judge Presiding

PER CURIAM:

Defendant, Mario P. Ruiz, was found guilty after a bench trial of the theft of property of the value of less than \$150 (Ill. Rev. Stat. 1971, ch. 38, par. 16-1(a)(1)) and placed on probation for one year. He appeals, contending that the State had not proved the ownership of the property and that he was not proved guilty beyond a reasonable doubt.

The complaint charged that the defendant on September 9, 1972, at 4810 N. Pulaski, Cook County, Illinois

"... committed the offense of theft in that he knowingly (obtained) unauthorized control over property ((1) men's belt \$5.99 and (1) Century dog collar \$1.88) of the value of \$150.00 or less, the property of (First Distributors, Inc.) an Illinois corporation with the intent to deprive said (First Distributors, Inc.) permanently of the use and benefit of said property in violation of Chapter 38, Section 16-1(a)(1) ..."

The complaining witness, Gus Kyriakopoulos, testified:

On September 9, 1972, he was employed at First Distributors, Incorporated, as a security agent at 4810 North Pulaski in the City of Chicago. He had been hired by somebody who was acting for the corporation. His checks are signed "First Distributors Incorporated". Its name was so designated on all its business stationery and outside the store.

About 2:00 P. M. on that date, a Saturday afternoon, defendant, Mario Ruiz, with his friend and his sister were in the store. The witness observed defendant in the men's department of the store select a belt and put it on himself by putting it through the belt loop on his pair of pants. Defendant did not have another belt at the time. (The belt was identified and

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admitted in evidence.) Neither defendant nor any of the people with him had any packages and the witness did not see any of them purchase anything up to that point. Defendant also selected two shirts, one for \$3.99, the other for \$9.47, and pulled the \$3.99 price ticket off of the shirt and placed it on the \$9.47 shirt. The witness was about 10 to 15 feet away facing defendant with nothing between them. Defendant's back was to him.

Defendant then left that department and went to the pet department where the store has dog collars. The witness saw defendant open a box which read "Sentry Dog Collar". (The box was admitted in evidence.) Defendant took out the dog collar and placed it under his windbreaker jacket. The witness was approximately the same distance from defendant as he was in the men's department. Defendant, with his friend and his sister, walked up to a cash register. The sister was in front, followed next by defendant and then by the friend. Another customer was between the witness and the friend. Defendant gave the shirt to his sister; she paid for two shirts. Defendant did not pay for any merchandise. The witness could not observe whether defendant still had on the belt.

Defendant then left the store and the witness at that time saw neither the belt nor the dog collar. Defendant had a sweater over his belt. Outside the store, the witness went up to the defendant, identified himself as a security guard, asked him to come back to the store and to give the witness the bag they had.

As soon as the defendant came back to the store, he broke away from the witness and ran and took the belt out and placed it inside the store. The witness observed him taking the belt off. The witness told defendant to keep his hands down and to walk with him without any further interruption and as the witness was walking back in the security office of the store, defendant opened his jacket, took it off and threw the collar. The witness retrieved both the belt and the collar and kept them.

Defendant, Mario Ruiz, with his brother acting as interpreter, testified:

He was in the First Distributors Store on September 9, 1972. He picked up the belt (Exhibit 1) in the men's department. Its price was \$5.99. He did not pick up the dog collar (Exhibit 2); he picked up a German Shepard dog collar. Its price was \$1.88. He paid for these items and got a receipt from First Distributors on September 9; the two items were \$1.88 and \$5.99. (The receipt was received in evidence.) They didn't give him a bag because he just bought two items. He had on a jacket and a sweater.

He (defendant) was stopped outside the store by the security guard. He didn't tell the guard that he had paid for these items because he didn't know what the guard was talking about. When the guard came up to him outside the store, he didn't have the belt wrapped around, nor did he have it in his hand; he had it in his pocket. He admitted he took off the belt.

Defendant first said he paid for this at the cash register in the middle, then at the one on the right-hand side and finally at one of the middle registers. Except for the time that he went back in the store with the security guard, that was the only time he was in the store on that day.

The complaining witness, recalled, testified that the number on the cash register receipt is Cash Register No. 9. There are ten cash registers, numbered from one through ten. Although he was guessing as to which were open and which were closed, he was pretty sure that cash registers Nos. 1, 9 and 10 were closed. He was sure and not guessing that it was cash register Nos. 1, 2 or 3 that defendant went through.

Defendant's argument that the State failed to prove the ownership of the belt and dog collar is two-fold: (1) it was not proved that First Distributors, Inc. was an Illinois corporation; and (2) it was not proved that First Distributors, Inc. was the owner of the property.

In a prosecution for theft, the State must allege and prove ownership or some form of superior possessory interest by one other than the defendant. People v. Thomas, 9 Ill.App.3d 384, 292 N.E.2d 153. Where it is alleged that the owner is a corporation, the legal existence of the corporation is a material fact which must be proved. People v. Gordon, 5 Ill.2d 91, 95, 125 N.E.2d 73.

In People v. Nelson, 124 Ill.App.2d 280, 260 N.E.2d 251, the court held that testimony of one who was on duty as a security officer for "Sears and Roebuck" and references in his testimony and in that of others including one of the defendants to "Sears", "Sears and Roebuck", "Sears Corporation", "Sears Warehouse" and "Sears Distribution Center at 2065 George Street in Melrose Park" was sufficient to prove the existence of Sears and Roebuck as a corporation and its ownership of the property burglarized.

In the case at bar, the complaint alleged that the offense took place at 4810 North Pulaski and that the property involved was that of "First Distributors Inc., an Illinois corporation". The complaining witness testified that he was hired by the corporation and worked as a security guard for First Distributors, Inc., at 4810 North Pulaski in the City of Chicago; that his checks were signed "First Distributors, Incorporated"; that its name was so designated on its stationery and on the outside of the store. "Inc." is a statutorily authorized abbreviation connoting an incorporated entity under the Business Corporation Act. People v. Cicchetti, 2 Ill.App.3d 535, 536, 275 N.E.2d 661. (See also, Certified List of Domestic and Foreign Corporations, 1972, p. 329. People v. Whittaker, 45 Ill.2d 491, 495, 259 N.E.2d 787.) The evidence was sufficient to prove that First Distributors, Inc. was an Illinois corporation and the trial judge correctly so found.

On the question of ownership of the property, the testimony of the security guard for First Distributors, Inc.

that he saw defendant in the men's department of the store select a belt and put it on and then saw the defendant in the pet department of the store open a dog collar box, take out a dog collar, place it under his windbreaker jacket and then leave the store without paying for these items is proof of ownership of these items by First Distributors, Inc. People v. Gordon, 5 Ill.2d 91, 96, 125 N.E.2d 73.

Indeed, defendant's own testimony that he bought the two items at the store and the cash register receipt from First Distributors, Inc. which he provided at trial are an admission that the two items were the property of First Distributors, Inc.

Defendant also argues that the testimony of the security guard was sufficiently inconsistent to leave a reasonable doubt as to defendant's guilt. However, he points to only minor inconsistencies in his testimony. The security guard's testimony was unshaken that he saw defendant, who was not wearing a belt, select a belt in the men's department and put it on. He also saw defendant in the pet department open a dog collar box, remove it, put it under his jacket, then go to a cash register with his companions where his sister paid for two shirts and defendant paid for nothing. Defendant then left the store. The guard stopped defendant, identified himself and asked defendant to come back into the store. Once inside the store, defendant broke away, ran, took off the belt and placed it inside the store. Defendant then took off his jacket and threw the dog collar. Defendant admitted he took off the belt, but he testified that he purchased the belt and a dog collar and produced a cash register receipt at the trial.

This case depends solely on the credibility of two witnesses -- the security guard and the defendant. It is the function of the trial court in a bench trial to determine the credibility of the witnesses and the weight to be given to their testimony. Its finding of guilty will be disturbed on appeal only where the evidence is so unreasonable, improbable and unsatisfactory

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as to leave a reasonable doubt as to defendant's guilt. People v. Catlett, 48 Ill.2d 56, 64, 268 N.E.2d 378. Here, the trial judge chose to believe the testimony of the State's witness. It cannot be said that that determination was erroneous.

The judgment of the circuit court of Cook County is affirmed.

AFFIRMED.

THIRD DIVISION: Justice Mejda did not participate.



15 I.A.³ 1049

No. 58438

PEOPLE OF THE STATE OF ILLINOIS,)	
	)	APPEAL FROM THE CIRCUIT
Respondent-Appellee,)	
	)	COURT OF COOK COUNTY.
vs.)	
	)	HONORABLE
ALFRED VINSON,	)	JAMES J. MEJDA,
	)	PRESIDING.
Petitioner-Appellant.)	

PER CURIAM:

Alfred Vinson (petitioner) was found guilty at a jury trial of the offenses of murder, attempt murder and two armed robberies and was sentenced to terms of years in the penitentiary. The judgments of conviction were affirmed by this court on direct appeal in People v. Vinson (1969), 116 Ill.App.2d 21, 253 N.E.2d 21. A pro se petition was subsequently filed pursuant to the Illinois Post-Conviction Hearing Act; the petition was amended by appointed private counsel and was dismissed on motion of the respondent without an evidentiary hearing. (Ill.Rev.Stat. 1971, ch.38, par.122-1 et seq.) Petitioner appeals, contending that the doctrines of res judicata and waiver do not apply to the matters set out in the post-conviction petition and that the petition alleges sufficient constitutional matters to entitle him to relief under the Act.

The pro se petition, filed as Number P.C. 2252, alleged in substance that petitioner was subjected to an improperly suggestive pre-trial line-up, which matter he brought to the attention of counsel who was appointed to represent him on the appeal from the judgments of conviction, but which matters said counsel failed to raise on that appeal.

Private counsel was thereafter appointed in connection with the post-conviction proceeding and filed an amended petition, in which the matter of the failure to raise the allegedly suggestive line-up on the direct appeal was abandoned. The amended petition raised a new matter, namely, that petitioner was denied a fair trial by reason of the trial court's allowance during a late stage of the trial of his co-defendant's motion for a

mistrial and a severance. The amended petition alleged, inter alia, that petitioner was jointly indicted and tried with Ozzie Stovall for the shooting and death of Henry Triplett and the shooting and wounding of Police Officer H. Moore during the course of an armed robbery of a service station by petitioner, Stovall and Triplett; that during the course of that trial Stovall was represented by the public defender while the petitioner was represented by counsel of his own choice; that during the course of the trial the petitioner was identified by two witnesses as the assailant who possessed the gun and did the shooting; that contrary to such testimony, a third State's witness identified co-defendant Stovall as the assailant who possessed the gun and did the shooting; that Stovall's counsel thereupon made a motion for mistrial and severance which was denied; that at the close of the State's case-in-chief, the motion for mistrial and severance was renewed by Stovall's counsel, was joined by prosecutor, and was allowed by the court; that the jury was thereafter instructed that the case would continue only as to petitioner; and that he was found guilty by the jury as charged. The amended petition further alleged that counsel appointed to represent petitioner on the direct appeal from the judgments of conviction interviewed petitioner prior to the appeal; that "despite petitioner's protestations to [counsel], the only issue raised by [counsel] in the Brief and Argument filed on behalf of petitioner was that the petitioner's sentences were excessive"; and that "by virtue of the foregoing" petitioner was denied a fair trial due to the allowance of Stovall's motion for mistrial and severance which "confused" the jury because of its lateness and from which the jury "concluded" that the trial judge disbelieved the testimony of the third State's witness, who placed the gun in the hand of Stovall. It was also alleged that petitioner was denied due process of law because he too was not granted a mistrial at that time.

Excerpts from the report of proceedings at trial, relating to the discussions had at the time Stovall's motions for mistrial and severance were made, have been incorporated into the amended post-conviction petition as exhibits. It appears that when Stovall's motion was made after the testimony was elicited from the State's witness on cross-examination by petitioner's counsel - that Stovall was in possession of the gun and did the shooting - the trial court denied the motion, stating that the grounds upon which it was based constituted a question of credibility for the trier of fact. When the motion was renewed by Stovall's counsel at the close of the State's case, counsel noted that that motion had been made (and denied) prior to and during trial, and that the evidence adduced during the course of the trial - that Stovall possessed the gun - created an antagonism between the petitioner and Stovall which counsel would be obliged to pursue. The State joined in the motion, stating, without objection, that when the initial motions for a severance were made, they were supported by "mere bare allegations" of antagonism between the petitioner and Stovall, but that the evidence since adduced at the trial confirmed that such antagonism in fact existed, which would not be conducive to a fair trial for either defendant. Petitioner's trial counsel objected to the motion on the ground that it came too late in the trial. The court noted that Stovall had not abandoned the motion for severance, and that it was not until the evidence was adduced at trial that it became apparent that a severance was necessary because of the antagonism which that evidence developed between the petitioner and Stovall. The motion for mistrial and severance as to Stovall was allowed, and the trial court thereafter instructed the jury that the matter would continue as to petitioner.

At the hearing on the respondent's motion to dismiss the petition, held before the same judge who had presided over the trial, the foregoing matters were urged by petitioner's counsel,

who also argued that a constitutional issue was presented by the allowance of the motion for mistrial and severance in that it violated petitioner's right to a fair trial, and that the doctrine of res judicata could not bar the raising of that issue in the post-conviction proceeding in light of the incompetency of petitioner's counsel appointed on the direct appeal from the judgments of conviction. The court noted that it had reviewed the trial matters relating to the allowance of the motion for mistrial and severance and that it there had relied upon case law with regard to the granting of such motion during the course of a trial, and dismissed the post-conviction petition without an evidentiary hearing.

While the pro se post-conviction petition alleges that counsel on the direct appeal from the judgments of conviction was requested by petitioner to raise the matter of the allegedly suggestive line-up identification as an issue on that appeal but that such request was not honored, the amended petition abandoned that ground for relief and raised instead the matter of the allowance of the motion for mistrial and severance after the close of the State's case and its alleged prejudicial effect on the right of petitioner to a fair trial. Although petitioner's brief on this appeal states that the latter ground had in fact been urged by him upon his appellate counsel as an issue to be raised on the direct appeal, whereas appellate counsel failed to do so, the amended post-conviction petition does not expressly allege that to have been the situation.

In People v. Hamby (1965), 32 Ill.2d 291, 205 N.E.2d 456, the Supreme Court denied strict application of the doctrine of res judicata in a post-conviction proceeding where petitioner sought to raise matters which could have been raised on the appeal from his conviction and where it also appeared from the direct appeal that petitioner and his appointed counsel were in disagreement on what was to be raised as points on that direct appeal.

However, in People v. Whittaker (1973), 10 Ill.App.3d 853, 295 N.E.2d 37, the court on review found no unfairness in refusing to allow consideration of an issue in a post-conviction proceeding which could have been, but was not raised on the direct appeal, the court noting that no showing had been made that counsel on the direct appeal refused to raise any issue after having been requested to do so by petitioner, as was the situation in the Hamby case.

As the record in the instant case demonstrates, the matter of the allowance of the motion for mistrial and severance, and its attendant circumstances, were of record and were before petitioner's counsel and the court on appeal. That matter could have been raised on the direct appeal and is therefore barred by the doctrine of res judicata. People v. Kamsler (1968), 39 Ill. 2d 73, 233 N.E.2d 415; People v. Vail (1970), 46 Ill.2d 589, 264 N.E.2d 201.

Assuming, without deciding, that the matter relating to the allowance of the motion for mistrial and severance was within the "protestations" alleged in the amended petition to have been made by petitioner to his appellate counsel, and that said counsel failed to raise the matter as a ground on the direct appeal, the circumstances surrounding the allowance of that motion do not disclose a violation of petitioner's right to a fair trial and would therefore not constitute a ground for relief under the Post-Conviction Hearing Act.

While it is true that the motion for mistrial and severance was not allowed until the close of the State's case-in-chief and while several cases hold that it is error under circumstances there involved to allow a motion for a severance at such a late date, the instant record reveals that prior to the time the motion was allowed, the trial court had been confronted with no proof that petitioner and Stovall would entertain antagonistic positions and that the court properly denied the motions for severance made prior to trial and prior to the time that

evidence was elicited. When the evidence adduced during the trial made it clear that neither the petitioner nor Stovall could receive a fair trial by being tried together, the court allowed the motion for mistrial and severance as to Stovall. (It should be noted that it does not appear in the record before this court, nor is it alleged in the post-conviction petition, that petitioner ever requested a mistrial as to his case.)

A motion for a severance is addressed to the sound discretion of the trial court. (People v. Earl (1966), 34 Ill.2d 11, 213 N.E.2d 556.) We do not consider the allowance of the motion for mistrial and severance at the close of the State's evidence, under the circumstances of this case and in light of the record before us, to have constituted an abuse of that discretion. See People v. DeBerry (1965), 62 Ill.App. 2d 323, 335, 211 N.E.2d 26, 1v. to app. den. 33 Ill.2d 626.

The cases of People v. Watt (1942), 380 Ill. 610, 44 N.E. 2d 580, and People v. Bradley (1964), 30 Ill.2d 597, 198 N.E. 2d 809, cited by petitioner, deal with the propriety of granting a severance after the trial has commenced and are distinguishable on their facts from the present case.

For the foregoing reasons, the order of the circuit court of Cook County is affirmed.

Order affirmed.

Third Division. JUSTICE MEJDA did not participate.

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